SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 838

NELLIE C. BOSTWICK, ET AL.,
Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOS. B. ADAMS,
Counsel for Petitioners.

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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Nellie C. Bostwick, a citizen of Duval County, Florida, Jacksonville Heights Improvement Company, a Florida corporation with its principal place of business at Jacksonville, Florida; Emma F. McDermott, Francis J. McDermott, James L. McDermott, John W. McDermott, Joseph McDermott and Wilfred J. McDermott, heirs of P. F. McDermott, deceased, respectively petitioning show to the Court:

Summary Statement of Matters Involved

This is a condemnation suit for a Naval Air Field. Petitioners were owners of sundry parcels of land taken. The

Respondent Baldwin Drainage District was an adverse claimant for drainage taxes.

The Record presented herewith consists of two parts. The first part, referred to as Vol. I, was the transcript of record brought here with a former Petition for Certiorari that was denied May 3, 1944, 319 U. S. 742. The second part, referred to as Vol. II, was the supplemental transcript presented to the Fifth Circuit Court of Appeals in connection with a second appeal to that Court in the same case, plus the proceedings had on said second appeal in said Circuit Court of Appeals.

The First appeal and Petition for Certiorari involved parcels 4, 5, 15 and 24 (Vol. I, pp. 21, 23, 30 and 36), as to which the Drainage District claimed a fee title (Vol. I, p. 61) by virtue of certain Federal Drainage Tax Foreclosure Decrees entered against Duval Cattle Company and Jacksonville Heights Improvement Company some 10 or 12 years before the takings in this suit. The District Court held (Vol. I, p. 276-282) that the Answers of the land-owners on the first appeal were incompetent collateral attacks on the former Federal Decrees and that said Decrees were res judicata. The Court of Appeals affirmed and this Court denied Certiorari (319 U. S. 742).

The Second appeal involved the non-decree lands, that is to say parcels against which the Drainage District had never obtained any decree foreclosing drainage taxes. The Petitioner Nellie C. Bostwick was conceded to be the owner of 520 acres described in the Government's Petition as Parcel 23 (Vol. I, 35-36) and claimed by her (Vol. I, pp. 83-84). The Petitioning heirs of P. F. McDermott were conceded to be the owners of Parcel 28 (Vol. I, p. 40) described in the Government's Petition and claimed by said heirs (Vol. I, pp. 86-87). The Petitioner Jacksonville Heights Improvement Company was conceded to be the owner of Parcels 14, 21, 22, 25, 36, and 37 described in the

Government's Petition (Vol. I, pp. 29, 34, 35, 38, and 45) and those parcels were claimed by that company (Vol. I, p. 84). The location of the McDermott Parcel 28, and the location of the parcels belonging to Jacksonville Heights Improvement Company can be identified on the map (Vol. I, p. 231).

The Respondent Baldwin Drainage District by Answer (Vol. I, p. 61 to 72) claimed drainage taxes against said parcels severally alleging to have accrued from the date of the taking back to various dates such as 1926, 1919 and the like, and the amounts, so claimed, far exceeded in most cases the amounts of the awards made by the Federal Jury (Vol. I, p. 273).

The Original Answer of Petitioners (Vol. I, p. 79 et sequi) attacked the validity of the drainage taxes claimed against the non-decree lands on sundry grounds.

A Suit in Equity was then pending in the State Court against the Drainage District involving other lands in the Western part of the District. In that suit similar attacks had been made on the validity of the drainage taxes. On account of the pendency of that suit the District Court made an Order, July 16, 1942 (Vol. I, pp. 274-275), deferring action as to the non-decree lands until the State case was disposed of. The Supreme Court of Florida rendered an adverse decision in that case on April 4, 1944, reported as *Baldwin Drainage District* v. *Macclenny Turpentine Company,* 18 So. 2d 792. Certiorari was applied for in this Court and denied January 15, 1945 (89 L. Ed. (Adv.) 415). It was contended, by Brief for Respondent in that case, that the Petitioners in that case had not by their Pleadings in the State Court properly presented any Federal question and that the State Supreme Court had not decided any Federal question. The denial of Certiorari apparently agreed with those contentions. Four days

afterwards, to-wit: January 19, 1945, the Petitioners, now before this Court, filed an Amended Answer (Vol. II, p. 33) in this and three other condemnation suits for the specific purpose of meeting the Federal question deficiencies claimed to have existed in the State Court record.

Prior to all those proceedings the Drainage District had filed on May 16, 1942, its Motion to Strike the Original Answer (Vol. I, p. 257) of these Petitioners. That Motion became applicable to the Amended Answer. On October 12, 1944 the Drainage District filed an Application for Distribution of the Awards (Vol. II, p. 13). On the same date these Petitioners filed a Motion (Vol. II, p. 6 to 12) for trial on the adverse claims. In that Motion the Petitioners set out sundry reasons why the decision of the Supreme Court of Florida in the *Macclenny Turpentine Company* case should not be controlling in determining the adverse claims in these Federal Condemnation suits. With those several Motions pending the District Court made an Order on January 24, 1945 (Vol. II, pp. 45-46) holding that in the light of the decision of the Supreme Court of Florida in *Baldwin Drainage District* v. *Macclenny Turpentine Company,* 18 So. 2d 792, the original Answer and Amended Answer of these Petitioners:

> "To be without merit as to all of the lands involved in this suit not heretofore included in any Federal Drainage Tax Foreclosure Decree."

Thereupon the said Order directed:

> "That all parts of the aforesaid original Answer not heretofore stricken and said Amended Answer are hereby stricken and held for naught as applied to all 'non-decree lands' which at the time of taking were claimed severally by said Defendants."

On the same date the District Court made an Order of Distribution (Vol. II, p. 47) giving to the Drainage District all of the award for Parcel 23, except what had been paid for

State and County taxes, and giving to the Drainage District nearly all of the award for Parcel 28 theretofore belonging to the McDermott Heirs, and giving to the Drainage District nearly all of the award for the parcels theretofore belonging to Jacksonville Heights Improvement Company.

On Appeal the Fifth Circuit Court of Appeals affirmed the Orders of the District Court, see Opinion (Vol. II, pp. 66 to 69). The primary basis of the affirming Opinion is found in the following language (Vol. II, p. 68):

> "Our course here has been charted by the Supreme Court of Florida and we must follow it."

The Court then cited, as controlling, *Baldwin Drainage District* v. *Macclenny Turpentine Company,* 18 So. 2d 792. The Petitioners here by their Petition for Rehearing filed December 18, 1945 (Vol. II, p. 71), endeavored to point out to the Court of Appeals what they believed to be the fundamental errors of the Court of Appeals and of the District Court. Nevertheless that Petition was denied January 7, 1946. Hence this Petition for Writ of Certiorari.

Basis of Jurisdiction

The Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, now 28 U. S. C. A., Sec. 347(a). The decree and judgment of the Circuit Court of Appeals for the Fifth Circuit was filed November 29, 1945 (Vol. II, p. 70). Petition for Rehearing was filed December 15, 1945 (Vol. II, p. 71). The Petition for Rehearing was denied January 7, 1946 (Vol. II, p. 81). Application for Stay Order was filed January 11, 1946 (Vol. II, p. 82), and an Order was made January 15, 1946 (Vol. II, p. 84) staying the Mandate of the Court in this and companion cases for a period of thirty days to permit filing of a Petition for Certiorari with accompanying record and if so filed until final dis-

position of the case by this Court. This Petition is being filed within the thirty days so allowed by said Order and within three months after date of said Opinion and Judgment and within much less than three months after Petition for Rehearing was denied. The opinion and judgment of said District Court of January 24, 1945 (Vol. II, p. 45 and 47) and the Opinion and Judgment of said Circuit Court of Appeals for the Fifth Circuit (Vol. II, pp. 66 and 70) had such finality as to warrant the issuance of Writ of Certiorari pursuant to this Petition.

Questions Presented

Upon the record and upon the opinion and judgment of the Circuit Court of Appeals for the Fifth Circuit as above explained the following important Federal questions are presented:

I

WHEN THE DISTRICT AND THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT WERE EXERCISING THEIR JURISDICTION IN A NON-DIVERSITY OF CITIZENSHIP CASE, PURSUANT TO 40 U. S. C. A., SECTION 258 (A), TO DETERMINE WHAT WAS "JUST AND EQUITABLE" BETWEEN THE PETITIONERS AND THE DRAINAGE DISTRICT AS ADVERSE CLAIMANTS, WERE SAID LOWER COURTS BOUND BY THE DOCTRINE OF ERIE R. CO. v. TOMPKINS AND HENCE CONTROLLED BY THE DECISION OF THE SUPREME COURT OF FLORIDA IN BALDWIN DRAINAGE DISTRICT v. MACCLENNY TURPENTINE COMPANY, 18 SO. 2D 792, ON A NON-FEDERAL QUESTION OF ACQUIESCENCE WHEN APPLIED TO OTHER PARTIES, OTHER LANDS AND OTHER FACTS?

The District Court and the Court of Appeals both answered this question in the affirmative. The petitioners believe that in so doing the decisions of said lower courts are in conflict with the decision of this Court in the case of *U. S.* v. *Miller,* 317 U. S. 369, 382, and in conflict with decision of the Second Circuit Court of Appeals in the case of *U. S.* v. *Certain Lands,* 129 F. (2d) 577. See fourth head-note and supporting text.

II

DOES THE RULE OF ERIE R. CO. v. TOMPKINS LEAVE UNDISTURBED QUESTIONS CONCERNING WHETHER THE PETITIONERS BY THE OPERATION OR APPLICATION OF THE FLORIDA DRAINAGE LAW HAVE BEEN DEPRIVED OF THEIR PROPERTIES WITHOUT DUE PROCESS OF LAW CONTRARY TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

This question was, by the Petition for Rehearing (Vol. II, p. 74), submitted to the Court of Appeals but without avail. We shall point out, by supporting brief, that the Amended Answer of the Petitioners (Vol. II, pp. 36, 38 and 42) properly and sufficiently presented such Federal questions and that such Federal questions had not been adequately presented to nor passed upon by the State Supreme Court. In any event petitioners contend that the District Court and the Court of Appeals had an independent responsibility under 40 U. S. C. A., Section 258(a) to pass upon and determine such Federal questions irrespective of what the Supreme Court of Florida said or did not say in the case of *Baldwin Drainage District* v. *Macclenny Turpentine Company*, 18 So. 2d 792. See 54 Am. Jur., Subject "United States Courts", Section 352, page 974 and cases cited in note 6.

III

DO FEDERAL COURTS WHEN APPLYING AND DETERMINING RIGHTS UNDER 40 U. S. C. A., SECTION 258 (A), OR UNDER THE NATIONAL BANKING ACT OR UNDER THE BANKRUPTCY ACT OR UNDER ANALOGOUS FEDERAL STATUTES, OR WHEN DECIDING QUESTIONS BASED ON THE FOURTEENTH AMENDMENT, APPLY THEIR OWN "FAMILIAR EQUITABLE DOCTRINES" WITH RESPECT TO LACHES, ACQUIESCENCE OR ESTOPPEL, WITHOUT BEING BOUND BY THE RULE OF ERIE R. CO. v. TOMPKINS WITH RESPECT TO STATE DECISIONS?

The Courts below, in effect, answered this question in the negative. By supporting brief we shall point out that such decisions by the lower courts in this case are in apparent conflict with decisions of this Court and with decisions of other Courts of Appeal. See for example: *Ketchum* v.

Duncan, 96 U. S. 659, 24 L. Ed. 868, 4th headnote; *O'Brien* v. *Wheelock*, 184 U. S. 450, 46 L. Ed. 636, 3rd and 4th headnotes; *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 90 L. Ed. (Adv.) 88, 2nd and 7th headnotes.

IV

IF THE LAST CLAUSE OF 40 U. S. C. A., SECTION 258 (A) VESTS IN FEDERAL COURTS AN INDEPENDENT RESPONSIBILITY TO DETERMINE WHAT IS "JUST AND EQUITABLE" BETWEEN ADVERSE CLAIMANTS, THEN WAS IT "JUST AND EQUITABLE" OR CONSISTENT WITH DUE PROCESS OF LAW, GUARANTEED BY THE FOURTEENTH AMENDMENT, TO STRIKE ALL OF THE ANSWERS OF PETITIONERS AND DISTRIBUTE PRACTICALLY ALL OF THE AWARDS FOR PETITIONERS LANDS TO THE DRAINAGE DISTRICT FOR ALLEGED DRAINAGE TAXES WHEN SOME TWO YEARS AFTER THE ASSESSMENT AND CONFIRMATION OF BENEFITS THE DRAINAGE DISTRICT CHANGED ITS PLAN OF RECLAMATION AND COMPLETELY ABANDONED ALL PROPOSED DRAINAGE IMPROVEMENTS WHICH MIGHT HAVE BEEN OF BENEFIT TO PETITIONERS LANDS OR WHICH MIGHT HAVE CONSTITUTED A CONSIDERATION TO PETITIONERS OR THEIR LANDS FOR THE SPECIAL ASSESSMENT TAXES LEVIED AND CLAIMED AGAINST SAID AWARDS?

The petitioners contend that there was a complete failure of consideration and the following are some of the authorities relied upon to support that contention, *District of Columbia* v. *Thompson*, 281 U. S. 25, 74 L. Ed. 677; *O'Brien* v. *Wheelock*, 184 U. S. 450, 491-492; *Gray's Limitation of Taxing Power*, Section 1999-b, p. 1022; *II Page and Jones, Taxation by Assessment*, p. 1596, notes 1 and 2; p. 2142, Section 1490, Notes 1 and 2; *Mayor, etc., of Baltimore* v. *Hettleman*, 37 Atl. 2d 335, 6th and 8th headnotes; *Huey* v. *Board of Drainage Commissioners*, (Ky.) 15 S. W. 2d 451; *Whitcher* v. *Bonneville Irrigation District*, (Utah) 256 Pac. 785, 4th headnote; *Smith* v. *Enterprise District*, (Oregon) 85 Pac. 2d. 1021, 2nd, 4th, 6th and 7th headnotes. Petitioners further contend that such a taking, without consideration, was not only an "unjust enrichment" but a tak-

ing without due process of law contrary to the Fourteenth Amendment, *Missouri Pacific R. Co.* v. *Nebraska, ex rel. Board of Transportation,* 164 U. S. 403, 417, 41 L. Ed. 489, 495; *Cooley's Constitutional Limitations,* 8th Ed., pp. 1081-1082; *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478, 60 L. Ed. 392. The Motion to Strike filed by the drainage district admitted all that petitioners' Answers alleged on the subject of abandonment and the failure and inability of the drainage district to make any drainage improvements that did or could have benefited petitioners property or be any consideration for the special assessments imposed. Nevertheless the District Court struck out all of said Answers and held the same for naught. The Court of Appeals affirmed that Order.

V

IF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS HAD AN INDEPENDENT POWER TO APPLY WHAT WAS "JUST AND EQUITABLE" AND APPLY THE PROTECTION AFFORDED BY THE FOURTEENTH AMENDMENT, IRRESPECTIVE OF WHAT THE SUPREME COURT OF FLORIDA SAID OR DID NOT SAY ON THOSE SUBJECTS IN THE MACCLENNY TURPENTINE COMPANY CASE, THEN WAS IT "JUST AND EQUITABLE" OR CONSISTENT WITH THE FOURTEENTH AMENDMENT FOR THE DRAINAGE DISTRICT, ON BECOMING INSOLVENT, TO WHOLLY ABANDON ABOUT TWENTY-FIVE PER CENT OF THE WHOLE AREA OF THE DISTRICT AND MAKE RADICAL CHANGES IN ITS PLAN OF RECLAMATION FOR THE REMAINING AREAS OF THE DISTRICT, ALL WITHOUT THE STATUTORY NOTICES AND HEARINGS PROVIDED FOR BY WHAT ARE NOW SECTIONS 298.07 AND 298.27 FLORIDA STATUTES 1941, AND WITHOUT OTHER COMPLIANCE WITH SAID STATUTES OR DUE PROCESS REQUIREMENTS, AND STILL USE THE ORIGINAL REPORT OF SPECIAL BENEFITS REPORTED IN AUGUST 1916 AND CONFIRMED IN OCTOBER 1916, AS A BASIS FOR LEVYING INSTALLMENT AND MAINTENANCE TAXES ON THE LANDS OF PETITIONERS AND OTHERS SIMILARLY SITUATED?

Petitioners contend that such taxation is neither "just and equitable" nor consistent with due process of law. Some of the authorities relied upon are as follows: *I Page*

and Jones, Taxation by Assessment, p. 200, note 4; *II Page and Jones, Taxation by Assessment*, p. 1141, notes 2, 3, and 4, and p. 1405, note 3. After the extensive abandonments and changes were made new notices and new hearings as to benefits were their absolute right under the statutes cited in the last question and under the Fourteenth Amendment. See cases cited in the notes of *Cooley's Constitutional Limitations*, 8th Edition, p. 1065; *Londoner* v. *Denver*, 210 U. S. 373, 385-386, 52 L. Ed. 1103, 1112. Additional authorities all holding that after such extensive abandonments and changes there could be no valid tax levies without new notices, new hearings, new assessment of benefits and new confirmation thereof are as follows: *McCreight* v. *Central Drainage Dist.*, (Miss.) 102 So. 276; *Armistead* v. *Southworth*, (Miss.) 104 So. 94, 1st and 2nd headnotes and supporting text; *Thomas* v. *Dallas County Levee Imp. Dist.* (Tex.) 23 S. W. 2d, 325, 3rd headnote and supporting text; *Kelleher* v. *Joint Drainage Dist.*, (Iowa) 249 N. W. 401; 28 C. J. S. 342, notes 30, 31 and 32; 28 C. J. S. 378-9, notes 68 and 75; 28 C. J. S. 458, note 78; *State* v. *Missouri Valley Drainage Dist.*, 185 S. W. 2d 800, 8th headnote, decided by the Supreme Court of Missouri March 5, 1945. The District Court struck out all the Answers of the petitioners thus closing the door to any hearing in Court. The Court of Appeals affirmed.

All the facts summarized in the fifth question above stated were admitted by the attacking Motions of the district. Thus the petitioners have never had any day in court on those questions either as required by the State Statutes or as required by the Fourteenth Amendment.

VI

IF THE DISTRICT COURT AND THE COURT OF APPEALS HAD INDEPENDENT JURISDICTION TO DETERMINE WHAT WAS "JUST AND EQUITABLE" AND WHAT WAS CONSISTENT WITH THE FOURTEENTH AMENDMENT, THEN WAS IT "JUST AND EQUITABLE" OR DUE PROCESS OF LAW TO STRIKE ALL OF THE ANSWERS OF PETITIONERS AND GIVE ALL OF THE AWARDS TO THE DRAINAGE DISTRICT WHEN AT LEAST ONE-SIXTH OF ALL THE TAXES CLAIMED BY THE DISTRICT WERE FOR PRETENDED MAINTENANCE TAXES LEVIED AFTER THE DRAINAGE DISTRICT BECAME INSOLVENT AND WHEN THERE WAS NEVER ANY MAINTENANCE ANYWHERE IN THE DISTRICT AND WHEN THERE WAS NOT EVEN ANY ORIGINAL CONSTRUCTION IN ABOUT TWENTY-FIVE PER CENT OF THE AREA OF THE DISTRICT INCLUDING THE PARTS WHERE PETITIONERS' LANDS WERE SITUATED?

All of the facts summarized in this question were clearly stated in the Answers of the petitioners and admitted by the attacking Motions of the drainage district. There never was any shadow of consideration for the pretended maintenance taxes included in the claims of the district as set forth in "Exhibit A" to its Answer (Vol. I, pp. 64 to 72). The Answers of petitioners further show that such maintenance taxes as were collected during the ten year period of the Federal Receivership from 1924 to 1934 were diverted by the Supervisors and Receiver to the payment of attorney's fees, receiver's fees, and costs in the Federal Foreclosure suits resulting in the decrees involved in the first appeal presented in this case.

If petitioners had paid such maintenance taxes as have been claimed against their lands the drainage district would have been "unjustly enriched". The mere passing of time or inaction by the petitioners in making attacks upon such maintenance taxes could not destroy their right to show a want of consideration or a failure of consideration for such taxes. *District of Columbia* v. *Thompson*, 281 U. S. 25, 74 L. Ed. 677; *Stockman* v. *City of Trenton*, 132 Fla. 406, 181

So. 383; *Smith* v. *City of Winter Haven,* 18 So. 2d, 4; *O'Brien* v. *Wheelock,* 184 U. S. 450, 491-492; *Gray's Limitations of Taxing Power,* Section 1999-b.

VII

IF WHEN DETERMINING RIGHTS BETWEEN ADVERSE CLAIMANTS UNDER THE LAST CLAUSE OF 40 U. S. C. A., SECTION 258 (A), FEDERAL COURTS MUST IN DISPOSING OF FEDERAL QUESTIONS AND NON-FEDERAL QUESTIONS BE BOUND BY STATE COURT DECISIONS, THEN MUST THE FEDERAL COURTS ABIDE BY A STATE COURT DECISION AS RES JUDICATA SIMPLY BECAUSE IT RELATES TO LANDS IN THE SAME TAXING DISTRICT EVEN THOUGH THE STATE CASE WAS UPON DIFFERENT ISSUES BETWEEN DIFFERENT PARTIES AND RELATED TO DIFFERENT LANDS, OR MAY SUCH FEDERAL COURTS IN TRYING TO ARRIVE AT WHAT THE STATE LAW IS, CONSIDER CONFLICTING STATE DECISIONS RENDERED BOTH BEFORE AND AFTER THE ONE DEALING WITH LANDS IN THE SAME TAXING DISTRICT AND IN CASE OF SUCH CONFLICT IS IT THE DUTY OF THE FEDERAL COURTS TO EXERCISE AN INDEPENDENT JUDGMENT ON MATTERS OF STATE LAW?

The petitioners by their Motion for trial on adverse claims (Vol. II, pp. 6 to 12) urged upon the District Court that the decision of the Florida Supreme Court in *Baldwin Drainage District* v. *Macclenny Turpentine Company,* 18 So. 2d, 792, was not controlling for sundry reasons and that the District Court should exercise its own independent judgment in disposing of the issues tendered by the Answers of petitioners then on file. The same Motion, by Section 9, also pointed out that since the decision in the *Macclenny Turpentine Company* case the Supreme Court of Florida had in *Smith* v. *City of Winter Haven,* 18 So. 2d 4, rendered a decision wholly inconsistent with the doctrine of acquiescence as set forth in the *Macclenny Turpentine Company* case, 18 So. 2d text 796. The Amended Answers of the petitioners filed in this and three other cases (Vol. II, pp. 33 to 45) were intended and especially designed to sufficiently invoke the protection of the Fourteenth Amendment and thereby meet alleged deficiencies in the

Bill which was before the Florida Supreme Court in the *Macclenny Turpentine Company* case. Nevertheless the District Court and the Court of Appeals treated the decision of the Supreme Court of Florida in the *Macclenny Turpentine Company* case substantially as *Res Judicata* and for that reason held for naught and struck out all the Answers of the petitioners, both the original Answer and the Amended Answer, and thereupon disbursed all of the awards of the juries to the drainage district. By supporting brief we shall point out in more detail some of the essential differences between the *Macclenny Turpentine Company* case and the case as made by the conflicting Answers of petitioners and drainage district in the case at bar. Briefly those differences are:

1. In the *Macclenny Turpentine Company* case that company and others were the actors by bill to cancel taxes. Here the adverse claimants are on each side both Plaintiff and Defendant.

2. There was no such non-resident original property owner involved in the *State* case as P. F. McDermott and his heirs whose status is described (Vol. I, pp. 86-87) of the case before the Court.

3. The parties, subject matter and causes of action were not the same.

4. The Supreme Court of Florida by-passed the real defenses or the real bases of attack made in the Bill of Complaint and undertook to dispose of the case on the basis of alleged acquiescence and estoppel which had neither been pleaded or proved by the drainage district.

We shall also, by supporting brief, present inconsistent decisions of the Florida Supreme Court rendered both prior and subsequent to the decision in the *Macclenny Turpentine Company* case. For instance: *Hughey* v. *Winter Haven,* 44

Fla. 601, 33 So. 249, decided in October, 1902, and in *Smith* v. *City of Winter Haven,* 18 So. 2d 4, decided May 9th, 1944, and in *State* v. *Town of Boynton Beach,* 129 Fla. 528, 177 So. 327, decided in July, 1937. Two before and one after the *Macclenny Turpentine Company* case in which the Supreme Court of Florida held that a standing by or acquiescence or even the payment of taxes upon properties illegally assessed or as to which no benefits were received, did not bar any defense by the property owner, but instead payment of taxes during such periods constituted "unjust enrichment". On the question of laches the decisions of the Supreme Court of Florida are equally inconsistent. See *Tampa Waterworks* v. *Woods,* 104 Fla. 306, 139 So. 800, decided in February, 1932, 3rd headnote, and in *State* v. *Town of Boca Raton,* 129 Fla. 673, 177 So. 293, 2nd headnote, and in *Smith* v. *City of Winter Haven,* 18 So. 2d 4, 6th headnote. In two decided before and one after the *Macclenny Turpentine Company* case the Florida Supreme Court held that a contention of laches is not available to a city or other party who has suffered no injury or change of position or who has been unjustly enriched. A similar subsequent decision is *Richmond* v. *Town of Largo,* 19 So. 2d 791. In this uncertain state of what the Florida Supreme Court will next decide as to the doctrine of acquiescence it became the duty of the District Court in this case to exercise an independent judgment and decide the adverse claims on their merits, even if there had been no Federal questions presented, *Meredith* v. *City of Winter Haven,* 320 U. S. 228, 88 L. Ed. 9.

The drainage district has now instituted a new suit, on its own account, to foreclose alleged drainage taxes on all that part of the drainage district situate in Nassau County constituting a One-Sixth (⅙th) of the whole area which lies in the northwest corner of the district. In that late foreclosure suit the property owners will point out such con-

flicting decisions of the Supreme Court of Florida and will also invoke the protection afforded by Section 29, Article 16, of the State Constitution which reads, in part, as follows:

> "No private property * * * shall be appropriated to the use of any corporation or individual until full compensation shall be first made to the owner."

The Supreme Court of Florida has repeatedly sustained the protection afforded by this Section of the Constitution in cases where there had been an arbitrary extension of municipal boundaries which resulted in taxation without municipal benefits, *State* v. *City of Stuart,* 97 Fla. 69, 120 So. 325; *State* v. *City of Avon Park,* 108 Fla. 641, 149 So. 408, 8th, 9th, 10th, 13th and 14th headnotes. In the case of *Hillsborough County* v. *Kensett,* 107 Fla. 237, 144 So. 393, the Court held that under the above quoted section of the State Constitution properly unlawfully taken without compensation could not become public property until paid for and the Court held substantially the same in the case of *Spafford* v. *Brevard County,* 92 Fla. 617, 110 So. 451. In *I Page and Jones on Taxation by Assessment,* Section 109, similar provisions from various State Constitutions are quoted. In Section 111, pages 183, 184 of the same volume, the authors point out that the,

> "Constitutional rule as to just compensation held to apply to assessments."

Many cases sustaining the text are cited in footnotes including *Norwood* v. *Baker,* 172 U. S. 269.

So in the case at bar, as also in the new case instituted to foreclose taxes, the taking of the lands by the drainage district has not been completed. Even if the attempted taking is for a public use the property owners in this case and in the new case, lately instituted, were and are entitled to be heard on the question of whether their properties are

being appropriated, either for a public use or a private use, without just compensation having previously been paid or the equivalent in benefits bestowed. The Supreme Court of Florida will ultimately have to decide this question in the new case because it was not presented or argued in the *Macclenny Turpentine Company* case.

In *Hamilton's Law of Special Assessments,* Section 795, it is said:

> "Where the assessing board lay a special assessment upon property regardless of the principle of benefits, *or materially in excess of the present benefits actually received,* it is a case of taking private property for public use without just compensation, and a proper case for the exercise of the equity jurisdiction." (Italics ours.)

This text is supported by many cases cited in Note 54.

In *II Page and Jones Taxation by Assessment,* p. 1147, it is said:

> "To whatever constitutional restriction or upon whatever theory it may be explained, the great weight of authority is that the legislature has no power to authorize assessments in substantial excess of the special benefits conferred upon the realty assessed by the improvement for which the assessment is levied. If the assessment is in substantial excess of the benefits conferred, it is invalid as a violation of the constitution."

This text is supported by many cases cited in Note 4.

The case of *Stockman* v. *City of Trenton,* 132 Fla. 406, 181 So. 383, 2nd headnote, is in harmony.

The petitioners contend that for the several reasons above noted the decision of the Supreme Court of Florida was not a complete bar against the petitioners with respect to the several matters urged by them in their amended answers. That this is especially so as applied to the Federal questions

invoked by petitioners' Answers which had not been properly presented to the State Supreme Court and were not in any sense determined by that Court. If the lower Courts are at liberty to apply well settled rules of laches and estoppel established by Federal courts then the ruling handed down in *O'Brien* v. *Wheelock,* 184 So. 450, will apply because in the instant case there are many similar facts. J. W. Harrell, attorney of record, claims to own about ninety-five per cent (95%) of the bonds of the drainage district, but he bought in the open market beginning in 1937 at prices from five cents (5¢) to ten cents (10¢) on the dollar and not from the drainage district as an original purchaser. That was the situation in the *O'Brien* case, the original bondholders took their losses—not the present bondholders. Again, as in the *O'Brien* case, the property owners did not get what they bargained for or what was promised in consideration of benefits assessed and the taxes levied. These distinctions are well pointed out in *Gray's Limitations of Taxing Power,* Section 1999-b, p. 1022, and cases cited in the notes. In contrast the property owners involved in *Shepard* v. *Barron,* 194 U. S. 553, and in *Utley* v. *St. Petersburg,* 292 U. S. 106, reaped the benefits—received all the benefits contemplated at the out-set and in addition the property owners in the *Shepard* case actually promoted the project. No such facts were pleaded or proven in the case at bar. The district was itself in default of performing its own undertakings for a period of about 25 years before the takings in this case occurred. The district was also insolvent and unable to perform for at least 20 years prior to the takings in this case. Therefore the district was never at any time in position to complain of any laches or take advantage of any apparent acquiescence on the part of property owners. It had never been prejudiced by any change of position on account of anything done or omitted by the property owners, *Ashwander* v. *Tennessee Valley Authority,* 297 U. S.

288, 80 L. Ed. 688, 5th headnote; *Pence* v. *Langdon*, 99 U. S. 578, 25 L. Ed. 420, 4th and 5th headnotes; *Ketchum* v. *Duncan*, 96 U. S. 659, 24 L. Ed. 868, 4th headnote.

Reasons Relied upon for Allowance of the Writ of Certiorari

A. IT IS A MATTER OF GREAT PUBLIC IMPORTANCE THAT THERE BE AN AUTHORITATIVE DECISION DEFINING THE JURISDICTION AND POWER OF LOWER FEDERAL COURTS IN THE ADMINISTRATION OF THE LAST CLAUSE OF 40 U. S. C. A., SECTION 258 (A), AND THE DECISIONS AND JUDGMENTS OF THE LOWER COURTS, IN THIS CAUSE, ARE APPARENTLY IN CONFLICT WITH THE DECISIONS OF THIS COURT IN *U. S.* v. *MILLER*, 317 U. S. 369, 382, 87 L. ED. 336, 347.

In the *Miller* case this Court defined the rule for determining the compensation to be paid to owners in condemnation suits such as the one at bar. Near the end of the opinion the Court observed,

> "The situation is like that in which litigants deposit money as security or to await the outcome of litigation. Notwithstanding the fact that the court released the fund to the respondents, the parties were still before it and it did not lose control of the fund but retained jurisdiction to deal with its retention or repayment *as justice might require.*" (Italics ours.)

We believe that the phrase "as justice might require" is equal to the phrase "just and equitable" found in the last clause of 40 U. S. C. A., Section 258 (a). If so it is a matter of Federal law and not of State law as to what is "just and equitable" in such cases. The 10th headnote (L.Ed) also supports this conclusion. The opinions and judgments below are apparently in conflict with that view.

B. THE OPINIONS AND JUDGMENTS OF THE COURTS BELOW ARE APPARENTLY IN CONFLICT WITH DECISIONS OF THIS COURT CONSTRUING AND APPLYING OTHER FEDERAL STATUTES WHICH CONTAIN CLAUSES ANALOGOUS TO THE LAST CLAUSE OF 40 U. S. C. A., SECTION 258 (A).

In *American Surety Co.* v. *Bethlehem Nat. Bank*, 314 U. S. 314, 86 L. Ed. 241, this Court construed and applied

the clause of the National Bank Act directing a "just and equal distribution" of an insolvent bank's assets. This was held to create rights under Federal law not controlled by State decisions. Another case under the National Bank Act was *D'Oench, D. & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 86 L. Ed. 956, where like conclusions were stated and where certiorari was granted because the decision of the lower Courts were asserted to be in conflict with a prior decision of the Court. A like decision was reached in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 87 L. Ed. 838. See 1st and 2nd headnotes and supporting text. Certiorari was granted because of the importance of the questions raised and because of the conflict between the decision below and the decision of another Circuit Court of Appeals.

In *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 86 L. Ed. 1293, the Court considered a clause of the Bankruptcy Act which required that any plan of reorganization must be one which,

> "Is fair and equitable and does not discriminate unfairly in the case of any class of creditors."

Here again the doctrine of *Erie R. Co.* v. *Tompkins* was held not to apply. In the opinion, 316 U. S. 95, the Court held:

> "In the interpretation and application of federal statutes, federal not local law applies."

The Court granted certiorari because of the importance in bankruptcy of the questions raised.

C. THE OPINIONS AND JUDGMENTS OF THE COURTS BELOW ARE IN CONFLICT WITH THE DECISION OF THE SECOND COURT OF APPEALS IN THE CASE OF *U. S.* v. *CERTAIN LANDS IN THE BOROUGH OF BROOKLYN*, 129 FED. 2D, 577.

In the case above cited from the Second Circuit Court of Appeals the Court construed and applied 40 U. S. C. A., Section 258 (a), and specifically held as in the 4th headnote:

> "The Circuit Court of Appeals was not bound to follow local law in construing provisions of the Declaration of Taking Act providing, in effect, that distribution of award in respect to encumbrances on condemned land shall be just and equitable. 40 U. S. C. A., Section 258 (a)."

In the opinion supporting the 4th headnote the Court cited *American Surety Co.* v. *Bethlehem Nat. Bank*, —— *supra*, which, as above noted, construed an analogous phrase of the National Bank Act. If the conclusion reached by the Second Circuit Court was correct then undoubtedly the conclusion reached by the Fifth Circuit Court in the case at bar was wrong. Such conflict between decisions of circuit courts of appeal is a familiar reason for granting certiorari. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, —— *supra.*

D. THE OPINION AND JUDGMENT OF THE FIFTH CIRCUIT COURT OF APPEALS IS ALSO APPARENTLY IN CONFLICT WITH THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN THE CASE OF *PURCELL* v. *SUMMERS*, 145 FED. 2D 979.

In the *Purcell* case the Court, speaking through Circuit Judge Parker, held that even in a diversity of citizenship case the findings of fact made by the Supreme Court of the State, based on pleadings and evidence before such state court would not be regarded as *res judicata* under the doctrine of *Erie R. Co.* v. *Tompkins*, and that a Federal court was not required to adopt the same findings of fact even if evidence had been taken in both cases and the

evidence was the same. In the case at bar the record shows that no evidence was taken in the state court case of Maclenny Turpentine Company and no evidence was taken in the courts below. Hence there is here much more reason why the rule announced by the Fourth Circuit Court of Appeals should prevail.

E. THE FIFTH CIRCUIT COURT OF APPEALS, BY ITS OPINION FILED IN THIS CAUSE, AS WE BELIEVE, MISAPPLIED THE DECISIONS OF THIS COURT IN *SHEPARD* v. *BARRON*, 194 U. S. 553, 48 L. ED. 1115, AND *UTLEY* v. *CITY OF ST. PETERSBURG*, 292 U. S. 106.

As previously noted in this petition the primary basis announced by the Court of Appeals for its opinion was that the Supreme Court of Florida had in the Maclenny Turpentine Company case charted the course which Court of Appeals had to follow. Nevertheless in the latter part of the opinion the Court of Appeals apparently endeavored to strengthen its position by citing the case of *Shepard* v. *Barron*, the *Utley* case and like decisions. The headnote of *Shepard* v. *Barron* (L. Ed.) plainly states facts which readily distinguish that case from anything contained in the record at bar. The property owners, there involved, not only petitioned for the improvements under the act in question but participated in carrying out the work and recognized the justice of the assessments from time to time during the progress of the work and in addition signed a statement for the purpose of inducing the issuance of improvement bonds to the effect that the work had been properly done. Thus the property owners burned their bridges behind them and they got what they bargained for. The record at bar is entirely to the contrary, the petitioners here got nothing and in no way participated in promoting the improvement. The district failed initially to make any improvement that could benefit petitioners' lands and thereupon became insolvent and for more than 20 years before

the taking was utterly unable to supply any consideration. The same distinctions will apply to *Utley* v. *St. Petersburg* because in that case the property owners in question stood by and saw their property improved, enjoyed the benefits of the improvement and waited until after the whole matter had been validated by the legislature and then sought to avoid payment of assessments. By accepting and enjoying the benefits—the consideration for which they bargained—they were held estopped to contest payment. It must be remembered also that in the case at bar the Answers of the petitioners set up an entirely different case and all the facts they pleaded were admitted by the attacking motions of the district. The result is that the doctrine of estoppel explained by this Court in *O'Brien* v. *Wheelock*, 184 U. S. 450, 491, 492, should apply, as also other cases cited in the notes of *Gray's Limitation of Taxing Power*, Section 1999-b, p. 1022. See also 48 Am. Jur., Subject "Special or Local Assessments," Section 296, p. 783 and cases cited in notes 7 to 17. Also *II Page and Jones* on *Taxation by Assessment*, Section 1028 and cases cited in notes 1, 7 and 12, also Section 1038 same volume.

Application for Consideration of Prior Record Without Printing

The petitioners by their undersigned counsel hereby make application to the Court to permit the original transcript, filed in this Court in the case of *Bostwick* v. *Baldwin Drainage District* and docketed at the October Term 1942 as case number 853, to be used and considered as a part of the transcript of record in connection with this Petition for Certiorari without reprinting said former transcript as a part of the record in this cause. Petitioners further say that on inquiry of the Clerk of this Court they were advised that his supply of copies of said former record had been exhausted, but that he does have the original

copy of said former record on file. The petitioners are also forwarding, with this petition, an additional copy of said former record duly certified by the Clerk of the Fifth Circuit Court of Appeals and they respectfully request that said additional certified copy be accepted for use in connection with this petition without reprinting the same, pending a decision of whether or not Writ of Certiorari will be granted or denied. Petitioners further say that the transcript of record made in said cause and filed with said Circuit Court of Appeals as case number 11347 plus additional proceedings in that Court has been duly certified by the Clerk of said Court and the requisite number of copies thereof will be filed in connection with this petition. Petitioners further say that copy of said original transcript, docketed in this Court as case number 853, at the October Term 1942, is now in the hands of Hon. Giles J. Patterson, attorney of record for the Respondents and a copy of same is in the hands of the undersigned counsel.

Wherefore your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth District commanding that court to certify and send to this Court for its review and determination on a day certain to be named therein the full and complete transcript of record and all proceedings in the case numbered on its docket No. 11347 and entitled *Nellie C. Bostwick, et al.*, v. *Baldwin Drainage District, et al.*, and that the decree of said United States Circuit Court of Appeals in said cause be reversed by this Court and that petitioners have such other and further relief in the premises as to this Court may seem just.

THOS. B. ADAMS,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 838

NELLIE C. BOSTWICK, ET AL.,

Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, ET AL.,

Respondents

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

I

Opinion Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit filed November 29, 1945, appears (Tr. Vol. II, p. 66), presented with Petition for Certiorari, at pages 69 to 73. The said opinion has now been reported as *Nellie C. Bostwick, et al.,* v. *Baldwin Drainage District, et al.,* 152 Fed. 2d 1. Petition for Rehearing was filed in the Fifth Circuit Court of Appeals on December 15, 1945, and denied January 7, 1946, all as shown by Volume II of the Transcript, page 81.

II

Jurisdiction

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction has been previously set out in the petition for writ of certiorari separately filed. Briefly Section 240 (a) Judicial Code, now 28 U. S. C. A., Section 347 (a) is the basis for said petition for writ of certiorari.

III

Statement of the Matters Involved

The aforesaid petition for writ of certiorari, pages 1 to 5, presents a "summary statement of matters involved" consisting for the most part in a history of this case including the substance of the decision of the courts below. Supplementing that statement the following matters may give a better understanding of the case:

1. The amended answer of petitioners (Vol. II, pp. 33 to 45) by Section I thereof (p. 34) reaverred all matters set up in the original answer showing derivation of title. Subsequent sections of the amended answer adopted and reaverred certain sections only of the original answer and then supplemented the averments of such sections of the original answer so adopted. By that means much of the original answer was eliminated, especially those parts attacking the corporate existence of the drainage district. Thus, as the record now stands, the petitioners are making no contest upon the corporate existence of the drainage district, and it is conceded, as held by the Supreme Court of Florida in a quo warranto case, namely: *State ex rel. Watson* v. *Covington,* 3 So. 2d, 521, that the drainage district had,

"at least a de facto existence."

The amended answer of petitioners bases its attack upon what occurred *subsequent* to the organization of the district and *subsequent* to the original confirmation of benefits reported by the commissioners. The matters chiefly complained of in the amended answer were not and could not have been contemplated or anticipated while the district was in process of formation or when the reported assessment of benefits was pending for confirmation as occurred on October 4, 1916.

2. The amended answer, as appears by Sections II, III, IV, VI, and VIII specifically (Vol. II, 35-36, 38, 42, 44) invoked the protection of the 14th Amendment as to those matters which occurred after October 4, 1916, and which operated to take petitioners' properties without due process of law and without any compensation in the form of benefits or otherwise.

3. The decision of the Supreme Court of Florida in the *Macclenny Turpentine Company* case, 18 So. 2d, text 794, recited thirteen attacks made by the Plaintiffs, in that case, upon the *corporate existence* of the drainage district and upon *original* assessments of benefits as *originally* confirmed October 4, 1916. It will be noted that no mention was made of *subsequent* abandonments of drainage improvements or the effect thereof. No mention was made of *subsequent* radical changes in the plan of reclamation without any new petition to the court, without new assessments of benefits, without new notices to property owners, without any new confirmation by the Court, all as required by what is now Sections 298.07 and 298.27 Florida Statutes 1941. Neither was any mention made in that statement of thirteen points, or any other place in the majority opinion, of any claim made under the 14th Amendment or of any

alleged violation thereof. It is clear, therefore, that when the majority opinion concluded, 18 So. 2d, text 796, that,

> "The bill in this case * * * clearly establishes * * * acquiescence on the part of those who could have protested",

the court had reference to the aforesaid thirteen points and did not deal with the happenings shown by the record in the case at bar *subsequent* to the original confirmation of the reported assessment of benefits nor did the court attempt to decide whether such *subsequent* happenings violated due process of law or took petitioners' property without just compensation or otherwise. When thus properly analyzed the decision in the *Macclenny Turpentine Company* case in no proper sense precluded a consideration of the merits of the contentions set up in petitioners' answers stricken by the courts below. The amended answer of petitioners and the adopted parts of the original answer of petitioners presented an entirely new case, between new parties, as to new lands or the awards made for those lands and the case of petitioners was based upon Federal Law and the 14th Amendment. This was especially so as regards the State law "as administered." *Myles Salt Co.* v. *Board of Commissioners, etc.*, 239 U. S. 478, 484, 60 L. Ed. 392, 396.

4. The soundness of the foregoing conclusions is shown by considering in some detail the case and claims of the McDermott heirs, petitioners here, as set up in the original answer (Vol. I, pp. 86-87). Their parcel No. 28 consisted of four 10 acre tracts or lots 3, 4, 5, and 6 in the northeast corner of Section 26, appearing on the map "Exhibit A" page 231, Vol. I. The plan of that subdivision was to treat the northeast corner of a section as block 1, the northwest corner as block 2, the southwest corner as block 3, and the

southeast corner as block 4. By reference to "Exhibit A" to the answer of the drainage district (Vol. I, p. 69) it will be found that items five to eight on that page represent the McDermotts' lots. From that page it appears that the McDermotts or their father paid drainage taxes up to 1933, but that $34.07 was claimed by the district as drainage taxes alleged to have accrued against each 10 acre tract for the years 1933 to 1941 inclusive. The same page shows the amount claimed for installment taxes, and the amount claimed for maintenance taxes and also interest against each of the four 10 acre lots. The original McDermott answer (Vol. I, pp. 86-87) shows that the father, P. F. McDermott, acquired title in 1910, some six years before the drainage district was organized; also that said McDermott was and his heirs are residents of California from the time of purchase to the time of taking and that they had no knowledge of any proceeding with respect to the Baldwin Drainage District either as to organization, assessment of benefits, the abandonments, the changes in plan of reclamation or otherwise. That the only knowledge they had was reports by the county tax collector that drainage taxes were due along with state and county taxes. Being such a long way off and not desiring to incur expenses they paid drainage taxes for many years without inquiry as to their validity. It is then specifically alleged in their original answer that their lands,

> "Were never benefitted by any of the drainage works and improvements constructed anywhere in said District, either for original construction or for pretended maintenance purposes."

All of the facts above mentioned were admitted by the motion to strike filed by the drainage district (Vol. I, p. 257). What the McDermotts paid in drainage taxes was

an "unjust enrichment" of the drainage district. *District of Columbia* v. *Thompson*, 281 U. S. 25, 74 L. Ed. 676. *Smith* v. *Winter Haven*, (Fla.) 18 So. 2d, 4.

5. Section IV of the amended answer (Vol. II, p. 39) adopts and reavers Section X of the original answer (Vol. I, pp. 134 to 141) and then adds:

> "(a) There was no original drainage construction ever put into effect with respect to the lands of these defendants severally."
>
> "(b) Many areas, including the lands of defendants severally were wholly abandoned and this particularly applies to the lands in the sourthern part of the Cecil Field area."
>
> "(c) Many areas including lands of these defendants were annually damaged by flooding and were never benefited. This particularly applies to the lands in the southern part of the Cecil Field area including parcel 23 belonging to the defendant Nellie C. Bostwick and parcel 28 belonging to the McDermott heirs."
>
> "(d) There was never any pretense of any maintainance whatsoever in any part of the district. That what taxes were collected for maintenance purposes during the period of receivership from 1924 to 1934 were diverted to the payment of attorney's fees, Court costs and other expenses incurred in and about certain drainage tax foreclosure suits."

All these averments and others contained in the amended answer were admitted by the drainage district.

Substantially the same showing was made by Mrs. Bostwick. Her title is set up (Vol. I, p. 83-84) and was based upon a Master's Deed of February 1925 foreclosing a mortgage given in July 1919 before anyone knew that the drainage district would wholly abandon that entire area and would later become insolvent and wholly unable to make any improvements in that area or furnish any main-

tenance. Mrs. Bostwick's forty acre tracts, making up parcel No. 23, in the Cecil Field area clearly appear on the map (Vol. I, p. 231). Her property in the southeast quarter of Section 23 joined the north end of the McDermott lots in the northeast corner of Section 26. Her parcel No. 23 is also identified as the forty acre parcels in "Exhibit A" to the answer of the drainage district (Vol. I, pp. 68, 71 and 72). From those pages it also appears that the drainage district claimed taxes against Mrs. Bostwick's lands from 1919 to 1941 for installment taxes, and for maintenance taxes, aggregating from $20.00 to $25.00 per acre. The jury awarded $5.00 per acre for the same land (Vol. I, p. 273). Hence the order of distribution (Vol. II, p. 50) gave all the awards to the drainage district, save what had been paid for state and county taxes. All of the averments of the amended answer, last above quoted, (Vol. II, p. 39) apply to Mrs. Bostwick's parcel No. 23.

6. Substantially the same set of facts applies to the parcels of Jacksonville Heights Improvement Company involved in this case, namely parcels 14, 21, 22, 25, 36 and 37. It appears from the government's petition (Vol. I, pp. 29, 34, 35, 38, and 45) and from the map "Exhibit A" (Vol. I, p. 231) that those 10 acre parcels are located in the southeast corner of Section 22, the west edge of the southwest quarter of Section 23, the southwest corner of Section 24, the northeast corner of Section 26 and the northeast corner of Section 27.

7. The defenses or attacks upon the drainage taxes levied from 1919 to 1941 inclusive for installment taxes and from 1924 to 1941 for maintenance taxes, may be briefly stated as follows:

(1) There was complete abandonment of all drainage improvements that could have benefitted petition-

ers lands—complete failure of consideration—and this was followed by complete insolvency of the drainage district rendering it unable to ever supply any consideration for the taxes levied. This occurred *subsequent* to the original report of assessment of benefits and *subsequent* to the original confirmation of benefits based upon the original plan of reclamation.

(2) Subsequent to the confirmation of original assessments radical changes were made in the plans for reclamation of areas not completely abandoned. A few of the parcels claimed by Jacksonville Heights Improvement Company were affected by such changes. Not so as to Mrs. Bostwick and the McDermotts, because the areas of their lands were completely abandoned. As to the areas affected by the radical changes the supervisors adopted new plans and new contracts for new canals, smaller canals, in new locations but there was no new application to the Court for authority to make such changes, no reassessment of benefits by commissioners, no new report by commissioners, no notices to property owners, as required by the statute, or as required by the 14th Amendment and no new confirmation by the Court. Nevertheless the supervisors continued to use the original reported assessment of benefits as a basis for levying pretended installment taxes and maintenance taxes.

(3) After the extensive abandonments aggregating about one-fourth (¼th) of the whole area of the district and after the radical changes, approved and put in force by the supervisors, for the remaining areas, the original assessment of benefits became *functus officio* and in any case became wholly arbitrary and capricious, as applied to the new status of abandoned areas and as applied to the new status of areas affected by the radical changes, all contrary to the due process and equal protection clauses of the 14th Amendment.

(4) As to maintenances taxes there was:

(a) No original construction—nothing to maintain—in the areas of petitioners' lands.

(b) No maintenance whatsoever in any part of the district.

(c) Maintenance levies were only pretended and began after the drainage district was insolvent and in the hands of a receiver. There was not a shadow of consideration for any of the maintenance taxes levied, yet it appears, by "Exhibit A" to the District's answer (Vol. I, p. 68 to 72) that about one-sixth (1/6th) of the taxes claimed against all lands, including the McDermott parcel, were claimed for maintenance taxes.

Additional facts will be discussed in the argument supporting the several assignment of errors.

IV

Assignment of Errors

1. *The District Court and the Court of Appeals erred in holding in effect that* Erie R. Co. *v.* Tompkins *was applicable in this case and that they were bound by the decision of the Supreme Court of Florida in the case of* Baldwin Drainage District *v.* Macclenny Turpentine Company, *18 So. 2d 792.*

2. *The courts below severally erred in striking and holding for naught all those parts of the original answer and amended answer of petitioners which set up complete failure of the drainage district to make any drainage improvements in the areas of petitioners' lands and the subsequent insolvency and inability of the district to ever furnish any consideration for the taxes levied against petitioners' lands. Such holdings were neither "just and equitable" nor consistent with the 14th Amendment.*

3. *The courts below severally erred in striking and holding for naught all those parts of the original answer and the amended answer of petitioners which set up sundry abandonments and radical changes in the plan of reclamation without any compliance with what are now Sections 298.07 and 298.27 Florida Statutes 1941, and without any compliance with due process requirements, followed by a continued use of the original assessment of benefits as a basis for levying installment and maintenance taxes.*

4. *The courts below severally erred in striking all those parts of petitioners' answer which set up the arbitrary and capricious character of the original assessments of benefits used as a basis for levying drainage taxes against lands in abandoned areas and as basis for other areas affected by radical and unauthorized changes in the plan of reclamation.*

5. *The courts below severally erred in striking and holding for naught all of those parts of the original answer and the amended answer of petitioners which set up the levying of pretended maintenance taxes from 1924 to 1941 inclusive, on lands in abandoned areas where there was nothing to maintain and on other areas where there was no maintenance and during a period when the district was wholly insolvent and wholly unable to furnish any consideration for such levies.*

6. *The Court of Appeals erred in its application of the doctrine of estoppel to the facts alleged in petitioners' answers and admitted by the District's motion to strike.*

The first assignment of error is jurisdictional in character. The other five assignments of error go to the merits of petitioners' case.

V

Argument

Error No. 1: *The District Court and the Court of Appeals erred in holding in effect that* Erie R. Co. *v.* Tompkins *was applicable in this case and that they were bound by the decision of the Supreme Court of Florida in the case of* Baldwin Drainage District *v.* Macclenny Turpentine Company, *18 So. 2d 792.*

This proposition was emphasized in the "Questions Presented" set forth in the petition for certiorari in support of which this brief is filed. On that account we believe it is unnecessary, in support of Error No. 1, to do more than restate some of the arguments and cite some of the authorities already set forth in the petition for certiorari.

The petitioners contend that the last clause of 40 U. S. C. A., Section 258 (a), vested in Federal courts an independent responsibility to determine what is "just and equitable" between adverse claimants in a condemnation suit brought under that Section, as in the case at bar, and in consequence that a Federal court when determining such adverse claims is not bound by the rule laid down in *Erie R. Co.* v. *Tompkins.* The order of the District Court (Vol. II, p. 46) striking the answers of the petitioners and holding the same for naught shows that the District Court deemed itself bound by the decision of the Florida Supreme Court in the *Macclenny Turpentine Company* case, 18 So. 2d 792. The opinion of the Fifth Circuit Court of Appeals (Vol. II, p. 66), 152 Fed. 2d 1, shows the same thing in so holding. The decisions of the courts below are in apparent conflict with this court's decision in the case of *U. S.* v. *Miller,* 317 U. S. 369, 382, and in conflict with the decision of the Second Circuit Court of Appeals in *U. S.* v. *Certain Lands,* 129 Fed. 2d 577, fourth headnote and supporting text.

This Court has lately rendered a number of decisions involving other Federal Statutes, containing analogous provisions, where it was held that the doctrine of *Erie R. Co.* v. *Tompkins* did not apply, and it seems to us that such holdings, with respect to analogous statutes, are equally applicable to the last clause of 40 U. S. C. A., Section 258 (a). That was the view taken by the Second Circuit Court of Appeals in *U. S.* v. *Certain Lands*, 129 Fed. 2d 577; because in that case the Second Circuit Court of Appeals cited, as authority for its conclusions, the decision of this Court in *American Surety Co.* v. *Bethlehem National Bank*, 314 U. S. 314, which construed and applied a clause in the National Banking Act directing a "just and equitable distribution" of an insolvent bank's assets. A still later decision of this Court, *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 87 L. Ed. 838, again construing the National Banking Act, seems to confirm the conclusion reached by the Second Circuit Court of Appeals in the case above cited. In cases involving the amendments to the Bankruptcy Act for the reorganization of public service corporations or for a composition of municipal indebtedness requiring that the plan of reorganization or the plan of composition be "fair and equitable", it has also been held that the doctrine of *Erie R. Co.* v. *Tompkins* is not applicable and that the Federal courts have an independent responsibility to apply well settled equitable doctrines evolved by the Federal Courts, *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 93-96; *Kelly* v. *Everglades Drainage District*, 319 U. S. 415. In the *Prudence Realization Corp.* case 316 U. S. 95, the court laid down this rule,

> "In the interpretation and application of federal statutes, federal not local law applies."

Like decisions have recently been rendered involving applications of the patent law. See *Solar Electric Co.* v. *Jefferson*, 317 U. S. 173.

It may well be that a Federal Court when sitting to determine adverse claims in a condemnation suit would follow decisions of the State court for an interpretation of a local statute but would nevertheless apply general equitable rules, evolved by Federal courts, in determining whether the application or administration of the local statute was consistent with the Federal Law such as the "just and equitable" clause of 40 U. S. C. A., Section 258 (a), or consistent with the requirements of the 14th Amendment. For instance in *State ex rel. Watson* v. *Covington*, 3 So. 2d, 521, the Florida Supreme Court held that the Baldwin Drainage District had,

> "at least a de facto existence".

Meaning that the petition for incorporating the district and the published notice and the decree of incorporation were sufficient under the general drainage law to bring about that result. Undoubtedly that conclusion would be accepted by a Federal court in passing upon the adverse claims involved in this case. We have assumed that it would be so as we pointed out on the second page of this brief. The petitioners, however, contend that when you come to know how the drainage law was *administered and applied* by the supervisors and others having control of the affairs of the district, that is quite a different matter. We think this conclusion is well supported by the decision of this Court in *Myles Salt Co.* v. *Board of Commissioners, etc.*, 239 U. S. 478, 60 L. Ed. 392, cited page 4 of this brief.

It was further pointed out in the petition for writ of certiorari, particularly under "Questions Presented" No. II, that this case involves an attack upon the administration

of the Florida Drainage Law based upon alleged violations of the due process clause and equal protection clause of the 14th Amendment. Thus the attack in that behalf is precisely of the same character as that involved in the *Myles Salt Company* case — *supra.* Moreover,

> "A statute valid as to one set of facts may be invalid as to another."

N. C. & St. L. R. Co. v. *Walters,* 294 U. S. 405; see also *Georgia R. & Electric Co.* v. *Decatur,* 295 U. S. 165, 79 L. Ed. 1365, 1st and 3rd headnotes. Therefore according to many decisions of this Court the rule of *Erie R. Co.* v. *Tompkins* could not apply when Federal courts are considering and passing upon such Federal questions based upon the 14th Amendment. In 54 Am. Jur., Subject "United States Courts", page 974, we find:

> "The rule laid down in that case, (Erie R. Co. v. Tompkins) does not extend to matters governed by Federal Constitution, by treaties of the United States, or by Acts of Congress."

Several decisions of this court are cited in Note 6 supporting this text.

In the petition for writ of certiorari we have urged that it is a matter of great public importance to have an authoritative decision from this Court clearly defining the jurisdiction and authority of lower Federal courts in administering the last clause of 40 U. S. C. A., Section 258 (a). The courts below have, as we believe, gone entirely too far in undertaking to follow a State court decision and that is one of the primary reasons why we believe writ of certiorari should be granted in this case. Another basic reason for granting the writ of certiorari is the apparent conflict between the decisions of the courts below and the decision of the Second Circuit Court of Appeals in *U. S.* v. *Certain*

Lands, 129 Fed. 2d 577. Another conflict seems to exist between the courts below and the decision of the Fourth Circuit Court of Appeals in the case of *Purcell* v. *Summers,* 145 Fed. 2d 979. See also *Richardson* v. *Commissioner,* 126 F. (2d) 562. Conflicting decisions are annotated 140 A. L. R. beginning page 717.

Error No. 2: *The courts below severally erred in striking and holding for naught all those parts of the original answer and amended answer of petitioners which set up complete failure of the drainage district to make any drainage improvements in the areas of petitioners lands and the subsequent insolvency and inability of the district to ever furnish any consideration for the taxes levied against petitioners lands.. Such holdings were neither "just and equitable" nor consistent with the 14th Amendment.*

..This matter of abandonment is fully set forth in the original and amended answers of petitioners. The amended answer adopts and reavers Sections VII, X, XI, and XII of the original answer.

..We have heretofore located the McDermott lots in the northeast corner of Section 26 on the plat (Vol. I, p. 231), also Mrs. Bostwick's parcel no. 23 consisting of the 40 acre tracts on the same plat in Sections 23, 25, and 27. It will be seen from the plat that Sal Taylor Creek crosses two of her 40 acre tracts in Section 27. Jacksonville Heights Improvement Company parcel no. 25 is a 10 acre piece in the southwest corner of Section 24, and Jacksonville Heights Improvement Company parcel no. 26 is a 10 acre piece in the northeast corner of Section 26. These two parcels lie between two of the 40 acre tracts belonging to Mrs. Bostwick. All of these parcels, the McDermotts, Mrs. Bostwicks and Jacksonville Heights Improvement Company, lie in an abandoned area. The same is true of all other parcels along the course of Sal Taylor Creek where it crosses Sections 25, 26 and 27.

In Section VII of the original answer (Vol. I, p. 123-124) it is alleged:

> "That the original plan of reclamation proposed to clear and grub a creek that ran north and south through the east half of Section 23 and the east half of Section 26 to join Sal Taylor Creek. That creek was never cleared and grubbed, * * * the whole of Section 23, the east half of 22 and the whole of 27 and the whole of 26 received no drainage whatsoever and no benefit whatsoever and yet they were arbitrarily assessed at not less than $30 per acre ranging up to $40 per acre."

These allegations relate to the abandoned areas above described. Again in Section X of the original answer (Vol. I, pp. 136-137) it is alleged:

> "That the map or plan of drainage called for the clearing and grubbing of floodways, one along Rowell Creek on the west edge of Sections 22 and 27 involved in this proceeding; another along Sal Taylor Creek in the southern part of Sections 27, 26 and 25 involved in this proceeding; another beginning in Section 23, thence south through that section and through a part of Section 26, whereas such floodways were never cleared and grubbed, much less were they ever maintained. On the contrary the greater volumes of water discharged into those creeks as aforesaid flooded and damaged those areas and made them less valuable than they were before any drainage works were constructed in the sections of land lying to the north thereof."

By Section XI of the original answer (Vol. I, p. 145) it is shown that in April 1918 the supervisors entered into a new construction contract, exemplified by "Exhibit B" to the original answer, adopting revised plans or maps for future construction work. The contract and revised plans are thus referred to on that page:

> "That by resolution of the supervisors passed February 13th, 1918, said revised maps or plans of drainage

> works were adopted and approved and later on to wit April 2nd, 1918, were formally incorporated in and used as the basis of said new contract. That said revised plans are hereto attached and made a part hereof marked Exhibits "C", "D", and "E".

Section XII of the original answer (Vol. I, p. 155-159) further explains what the abandonments amounted to in various parts of the district and the effect thereof. The showing made by the original answer as to abandonment is reinforced by the averments of Section VI of the amended answer (Vol. II, p. 40-43). At page 41 of that volume it is among other things stated:

> "That under said changed plans of reclamation practically the entire SW ½ of Township 3 South Range 24 East including about the SW ½ of Cecil Field was left entirely without any drainage improvements whatever and this was to follow pursuant to the adoption of the map, Exhibit E to this answer which occurred February 13, 1918."

The foregoing extracts from the original and amended answers of petitioners make it perfectly clear that there was complete abandonment of the lands of the McDermotts, Mrs. Bostwick and Jacksonville Heights Improvement Company in the southern part of the Cecil Field area. Those lands were not only abandoned as far as any benefits were concerned, but in addition they were actually damaged annually by flood waters discharged into the northern branches of the streams that flow through the southern part of that area.

The matter of abandonment is further demonstrated by "Exhibit G" to the original answer (Vol. I, p. 251-257). That exhibit was a copy of a report made by the engineer Mr. Simons, employed by the supervisors in 1928 to make a complete survey of the then existing status of the drainage canals and works within the district. The location of

canals and flood-ways, as originally proposed, in the southern township of the district was exemplified by the dotted lines on the map "Exhibit E" (Vol. I, p. 249). The location of canals and flood-ways according to the revised plan of 1917 is shown by the solid lines on the same map. The data on the margin of that map shows that the proposed cubic footage to be excavated was reduced nearly one-half. But when Mr. Simons made his report in 1928 he showed very much more the fact of abandonment in that township particularly in the southern part of what is now the Cecil Field area. In his report, "Exhibit G", he had the following to say with regard to the "E", "F" and "G" systems of drainage in the southern township:

> "The "E", "F" and "G" systems drain about 27 square miles into tributaries of the Yellow Water and Sal Taylor Creeks, which flow into Black Creek, thence into the St. Johns River. These systems were designed with good grades in most cases, yet they terminate in swamps or small runs to overflow through these runs and swamp."

By reference to "Exhibit D" to the original answer it will be seen that those three systems mentioned by Mr. Simons carried into the township north of the southern township and supposedly drained about five sections thereof. Taking those five sections from the 27, mentioned by him, leaves only about 22 sections of the southern township drained at all and 14 sections wholly without drainage. Furthermore he definitely reported that the ditches as dug in the northern part of the southern township terminated in:

> "Swamps or small runs to overflow through these runs and swamps."

All of which means that the ditches dug in Sections 11, 12, 13 and 14 of the southern township "Exhibit E" terminated in the northwest quarter of Section 24 and then flooded the

swamp shown as Sal Taylor Creek on the map at page 231 of the original transcript. Furthermore the extracts, above quoted from the original and amended answers (all admitted by the motion of the district), show that the proposed floodways in the area of petitioners lands were never cleared and grubbed but were left in their original condition to be flooded by excess water discharged into the northern ends of the creeks and branches as reported by Mr. Simons. These facts of abandonment took place *after* the district was organized and after the original assessment of benefits had been confirmed by the Court Order of October 4, 1916.

In addition to the facts of abandonment the amended answer of petitioners shows (Vol. II, p. 44) that for at least 15 years before 1937 the drainage district had been insolvent, dormant and inactive and that when the receiver was discharged in 1934 bonds of the district were selling at around five cents (5¢) on the dollar. Thus for many years prior to the taking in this condemnation suit the district had been utterly unable to supply any consideration for the drainage taxes levied against petitioners lands. In such circumstances there was *a complete failure of consideration* for those assessments. That in substance was one defense set up in the answers as above quoted.

The following authorities sustain that defense: *District of Columbia* v. *Thompson,* 281 U. S. 25, 74 L. Ed. 677, and cases annotated beginning 74 L. Ed., page 677; *Manley* v. *City of Marshfield,* 88 Ore. 482, 172 Pac. 488, 6th and 9th headnotes and supporting text; *Mayor, etc., of Baltimore* v. *Hettleman,* 37 Atl. 2d 335, 6th and 8th headnotes and supporting text; *Huey* v. *Board of Drainage Commissioners* (Ky.), 15 S. W. 2d 451; *Union Trust Company* v. *Carnhope Irr. Dist.* (Wash.), 232 Pac. 341, 1st and 5th headnotes; *Whitcher* v. *Bonneville Irr. Dist.* (Utah), 256 Pac. 785, 4th headnote and supporting text; *Smith* v.

Enterprise District (Oregon), 85 Pac. 2d 1021, 2d, 4th, 6th and 7th headnotes.

In *District of Columbia* v. *Thompson* the owner of property abutting on a proposed street after waiting 14 years for the improvement sued the district to recover special assessments he had previously paid. During that period the district had taken such action as to clearly show the abandonment of the project to improve that street. Said the court:

> "Under undisputed facts, we think the District was under an obligation imposed by law to return, *as for a failure of consideration*, the assessment of benefits that had been paid by the plaintiff." (Italics ours.)

If the plaintiff, in that case, had paid nothing during the 14 year period and the district had then sued to collect the assessments levied the case would have been substantially a parallel with the case at bar. And if that suit had been one by the district against the property owner to collect, undoubtedly the court would have recognized and sustained a defense of failure of consideration. Such a defense lasts as long as the claim lasts for obviously a property owner in such situation is under no obligation to take the initative and besides no taxing entity can claim any change of position to its own injury by reason of its own default.

The state cases cited above reached like results, where a city or other taxing district abandoned the whole or a substantial part of a proposed improvement project. The case of *Baltimore* v. *Hettleman* is instructive. There as in the *District of Columbia* case a proposed street improvement was abandoned and after a lapse of 13 years the property owner brought an action to cancel the assessment of benefits against his property which abutted on the proposed street improvement. The court held that he was entitled to cancellation on the theory that no consideration had been received. The city undertook to plead laches,

acquiescence and the like but the court answered that the property owner had no "power of prophecy," when the improvement was being proposed and ordered by the city to know that no such improvement would ever be made. The same is true of the petitioners.

The Kentucky case of *Huey* v. *Board of Drainage Commissioners* is another good illustration. In that case a part of a drainage scheme along a certain creek was abandoned and the plaintiff's property was along that creek and might have received benefits from the construction of that part of the project. Later it turned out that the drainage commissioners had abandoned that part of the project and left the plaintiff's property without benefit. The court held that the property owner was entitled to a cancellation of the drainage assessment and to have an injunction from levying further drainage assessments. Among other things the Kentucky court said:

> "It (District) should not abandon this part of the project in derogation of the rights of owners of lands adjudged to be benefited by such construction, and still force them to pay assessments on the main project."

There are a number of decisions by the Supreme Court of Florida which are in harmony with the above cases. In *City of Coral Gables* v. *State*, 129 Fla. 834, 177 So. 290, the court held as stated in the 1st headnote:

> "Property cannot be taxed for municipal purposes when such taxation would in effect deprive any person of property without due process of law or would take property without just compensation or would deny equal protection of laws."

In *State* v. *Town of Boca Raton*, 129 Fla. 673, 177 So. 293, the court held as stated in the 2nd headnote:

> "Where lands annexed by municipality were wild, unoccupied, unimproved lands, remote from municipality

> and receiving no benefits from municipality, annexation was illegal and could be questioned by landowner at any time."

In *Cosby* v. *Jumper Creek Drainage District*, 3 So. 2d 356, the drainage district under-took to enforce assessments against certain property after a delay of some 17 years. The property owner set up that a certain part of the drainage project might have given some benefit to his lands but that the district had failed to make that improvement. The court sustained that defense and quoted at length from the decision of this court in *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478, 60 L. Ed. 392. In *Smith* v. *City of Winter Haven*, 18 So. 2d 4, decided since the *Macclenny Turpentine Company* decision, the court held as stated in the 5th and 6th headnotes:

> "5. A taxpayer is not estopped from maintaining suit to enjoin future collection of unlawfully imposed tax by previous payment of such tax over a period of years."
>
> "6. Persons adversely affected thereby may raise the defense of laches, but it is not available to those who have been unjustly enriched thereby."

In the opinion the court among other things said:

> "When the relation between the taxes exacted and benefits conferred is not apparent, there is no basis whatever to sustain the tax."

The court further held that the city had been "unjustly enriched" by collecting previous assessments where no benefits had been conferred.

In the early case of *Wilkerson* v. *Leland*, 2 Peters 627, 7 L. Ed. 542, the court, speaking through Mr. Justice Story, said:

> "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred * * *. We

> know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

We submit that if the drainage district in this case is entitled to receive all of the awards made by the Federal jury after having abandoned the petitioners lands and left them without any improvements for more than 25 years, and after having become insolvent and unable to furnish any benefits to those lands, then there will be accomplished exactly what Mr. Justice Story says could not be accomplished.

It is unnecessary to go back to Mr. Justice Story's decision because in *Georgia Railway & Electric Co.* v. *City of Decatur*, 295 U. S. 165, 79 L. Ed. 1365, this court, in 1935, held as stated in the 3rd headnote (L. Ed.):

> "If the burden imposed by a municipal ordinance on a street railway company in assessing against it the cost of street paving is without any compensating advantage, an arbitrary abuse of power results, and the assessment amounts to confiscation."

Error No. 3: *The courts below severally erred in striking and holding for naught all those parts of the original answer and the amended answer of petitioners which set up sundry abandonments and radical changes in the plan of reclamation without any compliance with what are now Sections 298.07 and 298.27 Florida Statutes 1941, and without any compliance with due process requirements, followed by a continued use of the original assessment of benefits as a basis for levying installment and maintenance taxes.*

The matter of radical changes in the plan of reclamation is set out in Sections III, V, and VI of the amended answer

(Vol. II, pp. 36 to 43). Those sections of the amended answer adopted and reaverred Section VII of the original answer (Vol. I, pp. 118-127) and Section XI of the original answer (Vol. I, pp. 141-151), and Section XXI of the original answer (Vol. I, pp. 151-163).

The petitioners in the *Cecil Field* case, known in the Court of Appeals as case No. 11347, were primarily affected by the total abandonments as discussed under Error No. 2 above. Nevertheless these petitioners, in that particular case, were indirectly affected by radical changes made in other areas, because after the changes and abandonments the supervisors continued, year after year, to spread the burdens of taxation on their lands which should have been borne, if at all, by lands in other areas which actually did receive some degree of benefit.

The amended answer, found Volume II, and sundry other papers filed thereafter, including the hearing before the Court of Appeals, included four other cases not brought up with the record in case No. 11347. Nevertheless the record actually brought up also shows the effect of the radical changes and abandonments in other areas. Two of the other cases before the Court of Appeals, namely cases No. 11348 and No. 11355 involved about 9000 acres of land taken for a gunnery range lying north of the Cecil Field area embodied in case No. 11347 and south of the Seaboard Railroad, as shown on the map "Exhibit A" (Vol. I, p. 231). Both of those cases involved much larger holdings of Mrs. Bostwick and Jacksonville Heights Improvement Company than did case No. 11347. In addition those cases involved numerous other non-residents owning small 10 acre tracts similar to the McDermotts involved in case No. 11347 and who reside in California. It follows therefore that Error No. 3 is pertinent to the case of petitioners as applied to their lands in the Cecil Field area,

and likewise as applied to their lands in each of the other cases heard jointly by the Court of Appeals.

The changes in the plans of reclamation alleged in the original and amended answers must be considered in connection with the provisions of what are now Sections 298.07 and 298.27 Florida Statutes 1941, and in connection with the due process and equal protection clauses of the 14th Amendment.

THE SUPERVISORS UNDERTOOK TO AMEND THE DECREE CREATING THE DISTRICT AND TO AMEND THE PLANS OF RECLAMATION CONTRARY TO SECTION 298.07 FLORIDA STATUTES 1941 AND CONTRARY TO THE 14TH AMENDMENT.

Among the subjects which might be changed, pursuant to what is now Section 298.07 Florida Statutes 1941, was "to amend or change the plan of reclamation or the boundary of said district." The same Section further provided "If such petition asks the court's permission to change the plan of reclamation or that the boundary lines of such district be in any manner changed, it shall also ask the court to appoint three commissioners."

The commissioners so appointed are then to appraise and assess benefits on lands that may be annexed or affected by change in boundary lines, whereupon the notice to owners is then to be published in order that owners may be heard, after which a new Decree may be entered amending the plan of reclamation by changing the boundary lines or otherwise and if such Decree is entered, the commissioners are then to make a re-assessment of benefits in the same manner as when the District was originally created.

Sections VII and XII of the original answer, above cited, made it clear that the supervisors undertook in substance to greatly contract the boundaries of the District and to exclude many sections and parts of sections from the District for all purposes, except for the purpose of taxation, and that they did this without any petition to the Court,

without any authority from the Court, without any re-assessment of benefits and without any notice to property owners and without any pretense of complying with what is now Section 298.07 Florida Statutes 1941.

We have heretofore pointed out that the three revised maps for each of the three townships of the District were approved by resolution of the supervisors on February 18, 1918, and on April 2nd, 1918, thereafter they entered into a new construction contract using said revised maps as the basis of said contract (Vol. I, p. 145). If attention be now had to those three maps so adopted long prior to the second bond issue and even longer prior to the third bond issue, it is readily apparent that the supervisors did clearly violate what is now Section 298.07, Florida Statutes 1941. The legend on the left-hand margin of the map, Exhibit "C", explains that the short ditches originally proposed for Sections 4, 5 and 6 were to be entirely omitted, ⅔ of the ditch in Section 3 omitted. The map drawn by Simons in 1928 in connection with his report, Exhibit "G", shows that the ditch in Section 19 was entirely omitted. The revised map, Exhibit "D", shows by its legend that proposed ditches, namely, D-5 and D-6 in Sections 1 and 2, were entirely omitted, likewise proposed ditch D-2 in Sections 23 and 24 was entirely omitted. Also that the long ditch through Sections 30 to 25 was entirely omitted, also that the ditch for Section 33 and southwest part of 34 was entirely omitted. The revised map, Exhibit "E", shows that ditch H in the southwest corner of the township was omitted and that proposed ditch E-1 in Section 33 was omitted. Also that many other ditches were shifted and greatly reduced in size so that there was a reduction in cubic yardage from 547,902 cubic yards to 339,720 cubic yards—almost half.

The total elimination of the various entire sections, in the northeast corner, the northwest corner, the southwest corner, and in other parts of the District, amounted to the

same thing as contracting the boundaries of the District, because all of those entire sections were, by the changes attempted, entirely excluded from all drainage benefits proposed by the original plan of reclamation, which original plan was the basis of the original assessments of benefits made by the commissioners, reported to the Court and confirmed October 4, 1916. Yet on the showing made by the answers of the appellants, the commissioners proceeded without any petition to the Court, without any order of the Court and without any notice to the property owners and without giving the property owners in the excluded sections or other parts of the District, any opportunity whatsoever to be heard.

THE SUPERVISORS ALSO VIOLATED WHAT IS NOW SECTION 298.27 FLORIDA STATUTES 1941 AND THE 14TH AMENDMENT, IN THAT THEY UNDERTOOK TO AMEND THE PLANS OF RECLAMATION BY PROVIDING FOR NEW CANALS AND OTHER WORKS, ADDITIONAL BONDS AND ADDITIONAL TAXES WITHOUT ANY APPLICATION TO THE COURT, WITHOUT ANY NOTICE TO THE PROPERTY OWNERS, WITHOUT ANY RE-ASSESSMENT OF BENEFITS AND WITHOUT ANY APPROVAL THEREFOR FROM THE COURT.

The first sentence of Section 298.27, Florida Statutes 1941, provides that where the works or the original plan is found insufficient, the supervisors may formulate

> "New or amended plans, containing new canals, ditches, levees or other works."

The statute then provides that additional assessments may be made

> "in proportion to the increased benefits accruing to the lands because of the additional works."

The statute, however, provided that the new assessments were to be made by commissioners, appointed by the Court, who would act under the provisions of what is now Section

298.32 Florida Statutes 1941. The third sentence of the Section dealing with the same subject, provides that if the original plan of reclamation required modification by

> "enlarging or improving the other works authorized by the plan of reclamation, *or construction of additional canal, ditches or levees.*" (Italics ours.)

and the total tax originally levied under what is now Section 298.36 was insufficient

> "to carry out the plan of reclamation *with such modification.*" (Italics ours.)

then the Board of Supervisors were to file a petition with the Court organizing the District, praying for permission to change the plan of reclamation.

Sections VII and XII of the original answer of appellants show that the kind of changes in the plan of reclamation contemplated by this section of the law were attempted without any petition to the Court or any authority from the Court.

As we have seen, looking at the map, Exhibit "E", for Township 3, S. R. 24 E, there was a shifting of practically every proposed ditch or canal. This is readily seen by comparison of the dotted lines with the solid lines on the map and there was also a decrease in cubic yardage of nearly one-half. In addition, that which was proposed by Exhibit "E" was never actually carried out for as we have shown, the proposed floodways were never cut and opened and practically the entire southwest half of that township was left without any drainage improvements whatsoever. The changes attempted for township 2, S. R. 24 E, as shown on the map, Exhibit "D", were even greater. The long dotted lines through Sections 30 to 25 was original ditch D and was to carry water eastward into McGirt's Creek at the east edge of the District. That

ditch was entirely abandoned. So was the ditch to carry water out of Section 33 and in lieu of those two ditches a new ditch or canal, designated as D-7, was to carry water northward to meet two arms of Ditch D-1, one arm bringing water eastward from Section 30, the other arm bringing water westward from Section 27, thence northward through a new ditch, designated "C" under the Seaboard Railway to join ditch C-4, thence northward along the "C" channel to a proposed northern outlet on the north edge of the District in Section 6. Thus there was an entirely new plan for at least five sections of land south of the Seaboard Railroad, that is to say, to carry water north from the five sections, rather than eastward. That change becomes very material, because Case No. 11348 (D. C. 481) and Case No. 11355 (D. C. 527) took all of that area from the center of the Sections 29 and 32, south of the Seaboard and eastward into Sections 23, 26 and 35. The appellants I. Otto Brown, Nellie C. Bostwick, Jacksonville Heights Improvement Company and all other appellants in D. C. No. 481, and D. C. No. 527, were directly affected by the new plans and changes under discussion, because they owned lands along the proposed, but abandoned, ditches.

Without further analysis, it is perfectly clear that the adoption of such a new plan of drainage and the changes in the locations of canal, in the size of canals and in the construction of new canals to effect the changed plan of reclamation, all brought the situation within the purview of what is now Section 298.27, Florida Statutes 1941. Nevertheless, the supervisors didn't make any pretense of filing any petition with the Court for authority to make such changes, they procured no order in that behalf, no notice was published to property owners, no reassessment of benefits were made and no court order was made approving such reassessed benefits.

Further parts of Section 298.27 show without any doubt that what the supervisors undertook to do was clearly illegal and void. That Section further provides:

> "*After* the lists of land with the assessed benefits (meaning the re-assessment of benefits) and the decree and judgment of the court have been filed in the office of the clerk of the circuit court as provided in Section 298.34, then the Board shall have power to levy an *additional tax* * * * to pay increased cost of the completion of the proposed works and improvements as shown in said plan of reclamation *as amended.*" (Italics ours.)

Under this part of the statute, no "additional tax" could be levied to pay the increased cost of completing the work under the revised plans until and unless Court authority has been obtained, commissioners appointed, reassessments made and approved by the Court. Those were all conditions precedent to the levy of any "additional tax"—none was ever fulfilled. The same section then further provides:

> "And if in their judgment it seems best to issue bonds not to exceed the amount of said additional levy."

This language shows very clearly that bonds could not legally be issued unless there had been a legal "additional tax" levy after compliance with conditions precedent, above mentioned. The result is that the entire second and third bond issues involved in this case were utterly void and all additional taxes levied in consequence thereof were void. Neither the second bond issue nor the third bond issue was ever validated and, therefore, there can be no argument as to whether this point can now be considered.

The showing made by the original answer adopted by the appellants is further reinforced by the averments contained in Section II of the amended answers (Vol. II, pp. 36-38). It is there specifically pointed out that the doings of the supervisors prevented property owners from having any hearing and prevented them from having any means of knowing what the supervisors had done. The Statute undertook to secure to property owners due process of law by specifically requiring published notices and hearings, but none was had. Property owners were left in the dark. Resident property owners had no opportunity to know the extent of the changes or the materiality thereof, much less non-residents, such as the owners of the McDermott tracts, living in the State of California. It follows, therefore, without citation of any authority, that the continued use of the old assessments of benefits reported in August, 1916, and approved in October, 1916, after all of the eliminations and changes, above shown, operated to take the properties of these appellants severally without due process of law and without equal protection of the laws. This violation of Federal rights is specifically charged in Sections III and VI of the amended answers, but was not charged in the *Macclenny Turpentine Company* case, therefore, not passed upon by the Florida Supreme Court.

Many cases distinctly hold that where material changes and amendments have been made to the plan of reclamation new authority must be obtained from the court or from the body having authority, new notices to property owners and a new basis of benefits arrived at before new taxes can be justly imposed. Examples of such holdings are *Duncan* v. *St. Johns Levee & D. Dist.* (8 C. C. A.), 69 Fed. 2d 342; *McCreight* v. *Central Drainage Dist.* (Miss.), 102 So. 276; *Armistead* v. *Southworth* (Miss.),

104 So. 94, 1st and 2nd headnotes and supporting text; *Thomas* v. *Dallas County Levee Imp. Dist.* (Tex.), 23 S. W. 2d 325, 2rd headnote and supporting text; *Kelleher* v. *Joint Drainage Dist.* (Iowa), 249 N. W. 401; 28 C. J. S. 342, notes 30, 31 and 32; 28 C. J. S. 378-9, notes 68 and 75; 28 C. J. S. 458, note 78; *State* v. *Missouri Valley Drainage Dist.*, 185 S. W. 2d 800, 8th headnote, decided by the Supreme Court of Missouri March 5, 1945; *Ecker* v. *Southwest Tampa Storm Sewer D. Dist.*, 75 Fed. 2d 780.

In addition the want of notice to property owners and want of any hearing on proposed reassessments were likewise fatal—because the right to notice and hearing were secured by the 14th Amendment. *Browning* v. *Hooper*, 269 U. S. 396, 70 L. Ed. 330, 6th N; *Londoner* v. *Denver*, 210 U. S. 373, 385-386, 52 L. Ed. 1103, 1112; *Redman* v. *Kyle*, 76 Fla. 79, 80 So. 300; *Cooley's Constitutional Limitations*, 8th Ed., notes page 1065.

The case of *Hagar* v. *Reclamatoin Dist. No. 108*, 111 U. S. 701, 28 L. Ed. 569, is material in two aspects of the argument made in support of Error No. 3. In that case, 111 U. S. text 706, the court laid down this rule in a reclamation case supported by special assessments the same as in this case:

> "The rule, that he who reaps the benefit should bear the burden, must in such cases be applied."

The non-application of that rule is the basis of these petitioners' complaint. In the latter part of the *Hagar* decision, 111 U. S., text 711, it was further pointed out that under the law of California pertaining to the reclamation of swamp lands assessments for such purposes could be enforced

> "Only by suits and, of course, to their validity it is essential that notice be given to the taxpayer and

> opportunity be afforded him to be heard respecting the assessment."

The court then added that,

> "If property, taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, * * * these words * * * can have no definite meaning."

But in the case at bar the courts below absolutely denied any such right to the petitioners by striking out and holding for naught their original answer and amended answer.

It may be contended by counsel for respondent that the matter of abandonment as herein complained of and the matter of radical changes as herein complained of have heretofore been before the courts and have been disposed of adversely to our contentions. The case of *Duval Cattle Company* v. *Edward S. Hemphill, as Receiver for Baldwin Drainage District,* reported 41 Fed. 2d, 443, may be cited in connection with such contention, if so, the contention is unsound. It is true that the answer filed by the Duval Cattle Company in that tax foreclosure case asserted as a conclusion that the official plan of reclamation had been changed in material particulars, but only about 10 lines of the answer were devoted to that subject and the answer did not show what the changes were or how, if at all, they affected the lands of Duval Cattle Company involved in that case. Nothing whatsoever was asserted in the answer of Duval Cattle Company with respect to abandonment, therefore the lame effort to assert material changes was wholly insufficient from the standpoint of pleading and besides the principal defense relied upon by the Duval Cattle Company was a plea of payment and that failed for reasons stated in the opinion of the Court of Appeals. The plea of payment itself was inconsistent with any other defense.

Opposing counsel may contend that the Supreme Court of Florida had the same matter before it in the *Macclenny Turpentine Company* case. It is true that the bill of complaint in that case did complain of abandonments and changes in the plan of reclamation affecting the lands involved in that case, but as will be seen by the opinion of the Supreme Court of Florida, 18 So. 2, text 794, the 13th point listed by the court as grounds of attack on district proceedings did not mention any abandonments and nowhere in the opinion did the court mention, construe or apply what are now Sections 298.07 and 298.27, Florida Statutes 1941. Moreover as previously noted in the petition for certiorari and in this brief the plaintiffs in the *Macclenny Turpentine Company* case did not properly invoke the protection of the 14th Amendment and the majority opinion in that case did not undertake to pass upon any such constitutional question. It follows, therefore, that the petitioners in these cases were entitled to have their answers relating to the subject matters set forth in Error No. 3 considered on their merits. Both of the courts below refused so to do.

Error No. 4. *The courts below severally erred in striking all those parts of petitioners' answer which set up the arbitrary and capricious character of the original assessments of benefits used as a basis for levying drainage taxes against lands in abandoned areas and as basis for other areas affected by radical and unauthorized changes in the plan of reclamation.*

This matter was covered by Section III of petitioners' amended answer Vol. II pages 36 to 39. The attack is not upon the assessment of benefits confirmed by the Circuit Court on October 4, 1916, as applied to the plan of reclamation which had been previously adopted and used by the

commissioner as a basis for their assessments. What the petitioners complain of is the continued use of those assessments of benefits as a basis for levying taxes *subsequent to the numerous abandonments and radical changes in the plan of reclamation.* The contention is that the old assessment of benefits, as applied to the changed status, were entirely arbitrary and capricious and that when the supervisors themselves abandoned about one-fourth (¼th) of the entire area in the district and made radical changes in the remainder they, in effect, vacated and nullified the original assessment of benefits to such an extent that the order of confirmation made on October 4, 1916, was no longer effective to prevent a consideration of the arbitrary and capricious character of the assessments as applied to the new status created by the supervisors themselves.

As previously pointed out the Supreme Court of Florida did not in the *Macclenny Turpentine Company* case consider any such matter nor did the court consider or apply what are now Sections 298.07 and 298.27 Florida Statutes 1941. Neither has the Supreme Court of the State in any other case construed or interpreted those sections of the drainage law. Therefore it was necessary for the lower Federal courts to assume that responsibility. In the case of *Markham* v. *Allen*, decided by this Court January 7, 1946, and now reported 90 L. Ed. (Adv.) 254, 257, it was stated:

> "The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner."

In the absence of any interpretations by the Supreme Court of Florida we may find instructive the decisions of the Supreme Court of Missouri construing the drainage law of that state from which the Florida drainage law, Chapter 6458, Laws of Florida 1913, was adopted and

literally copied. In the case of *Mound City Land & Stock Co.* v. *Miller,* 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727, the Supreme Court of Missouri, construing the drainage law of that state as then existing, said:

> "The power to levy an assessment upon the lands in question is not to be understood as a power to tax in the ordinary meaning of that term. It is the power to compel the payment of a sum limited by the terms of the law *as a compensation for a direct benefit conferred.*" (Italics ours.)

In a prior part of the same opinion the Missouri Supreme Court also adopted the language of Mr. Justice Field in *Hagar* v. *Reclamation Dist.,* No. 108, *supra,* to the effect,

> "That he who reaps the benefit should bear the burden."

In *Pinellas Park Drain. Dist.* v. *Kessler,* 69 Fla. 558, 68 So. 668, the Supreme Court of Florida when generally upholding the constitutionality of the Florida Drainage Act of 1913 cited, with approval, the decision of the Supreme Court of Missouri in the *Miller* case, *supra.* Thus the Florida Supreme Court conceded that the general drainage scheme, as defined by the Missouri Court in the *Miller* case, had been brought over and adopted in Florida by the enactment of Chapter 6458, Laws of Florida 1913.

We can pass next to two very late decisions of the Missouri court dealing with the Missouri amended drainage law approved March 24, 1913 and appearing in Missouri Laws of that year pages 232 to 267. The amended Missouri law was virtually copied by Chapter 6458, Laws of 1913, approved June 9, 1913. In the case of *Jacoby* v. *Missouri Valley Drain. Dist.,* 163 S. W. 2d 930, it appeared that the district had been organized under the Missouri Statute of 1913. Jacoby had been appointed chief engineer and after

completing his work commissioners were appointed to assess benefits, which were reported to the Court and confirmed. The preliminary levy of 50¢ per acre had been exhausted wtihout completely paying the engineer's expenses and other expenses incurred. In the meantime the Federal government, by purchase and condemnation, acquired a little more than 25% of the area as a game preserve. Jacoby got a judgment against the district for the remainder of the compensation and his assignee then brought a mandamus suit against the district reported as *State* v. *Missouri Valley Drain. Dist.*, 185 S. W. 2d 800. In the mandamus case the assigne of Jacoby undertook to compel the levy of an additional tax to pay off the judgment. In the mandamus case the Supreme Court of Missouri first pointed out:

> "A tax may not be levied unless expressly authorized by statute."

also that,

> "When authorized, a tax may be levied only within the terms of the statute."

The court thereupon denied the writ and the reason for such holding was stated in the 8th and 9th headnotes, reading as follows:

> "Where action of federal government in condemning part of area of drainage district made it impossible to carry out approved reclamation plan, the district could legally proceed with a new plan, but such action would require a new assessment of benefits based on new plan. Mo. R. S. A., 12324 et seq.
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> • • • • • • •
>
> "Judgment against drainage district on warrants for engineer's services in preparing reclamation plan which had been approved, but which could not be carried out because federal government had condemned part of

> area of district, could not be paid out of a levy made on basis of benefit assessments under an abandoned reclamation plan. Mo. R. S. A., 12324 et seq."

In the Opinion, 185 SW, 2d, text 803, Mr. Justice Hyde explained the basis of the holding represented by the 8th and 9th headnotes, as follows:

> "I do not think that relator's judgment can now be paid out of a levy on the basis of the present benefit assessments because these benefits are based on a plan of reclamation which it is impossible to use and which had to be abandoned. When that plan was made useless before anything was done under it, were not also the benefits assessed under it made uncollectable? Were not these benefit assessments necessarily abandoned with the abandonment of the plan? They were assessed only on the basis of its use, Sec. 12336 so provides. All references are to R. S., 1939, and Mo. R. S. A. This drainage article, Art. I, Chap. 79, contemplates that all payments for the costs of any plan of reclamation shall be in proportion to the benefits each landowner would derive from its completion. Now when it is conceded that work under this plan is impossible and that none can ever be commenced under it, it does not seem to me that payment of any part of the estimated benefits (from its completion) should now be required by mandamus."

Section 12336 of the Missouri Statutes cited in this quotation is the same as Section 13 of Chapter 6458, Laws of Florida 1913 and the same as what is now Section 298.32 Florida Statutes 1941. It follows therefore that the quotation, last above, is a construction by the Missouri Supreme Court to the effect that if there has been an abandonment in material respects of the plan of reclamation then no tax can be subsequently levied if based upon the original assessment of benefits. In the case at bar the supervisors of the district by their own acts deliberately abandoned about 25%

of the district and by their own acts undertook to radically change the plan of reclamation for other lands, but without new court authority, without any notice to property owners and without any reassessment of benefits. Under the analysis made by the Supreme Court of Missouri the original assessments of benefits were abandoned along with the abandonment of the original plan of reclamation and the supervisors, for reasons set forth by Mr. Justice Hyde, had no power to use such assessment of benefits as a basis for levying either installment taxes or maintenance taxes even if such assessment of benefits had not been arbitrary and capricious as applied to the original plan of reclamation.

Since there was never any court confirmation of the assessment of benefits as applied to the new status created by the abandonments and radical changes, we are, therefore, justified in making a new examination of the assessment of benefits, reported by the commissioners in August 1916, to ascertain if they were arbitrary and capricious in the first instance or whether they have such character as applied to the new status which the supervisors themselves undertook to create.

The capricious and arbitrary character of the assessments of benefits was initially shown by Section VII of the original answer particularly (Vol. I, p. 122 to 126). The same thing was reaverred and reinforced by Section III of the amended answer (Vol. II, p. 37). Exhibit "A" to the original answer (Vol. I, p. 231) also is material to the same inquiry. The figures marked on the several parcels of land in the Cecil Field area of that map represent the total of the reported assessments of benefits against each parcel. For instance, the commissioners in August 1916, reported total benefits of $300.00 on each of the four lots belonging to P. F. McDermott, that is to say lots 3, 4, 5, and 6, in the northeast corner of Section 26, which made the reported special benefits to accrue to those lots, from the

proposed plan of reclamation, $30.00 per acre. The same report showed that the basic value of the land, when taken for canal purposes, was $4.00 per acre, and in this case the Federal condemnation jury found the same land to have a value of $5.00 per acre. Exhibit "E" to the original answer shows that nothing was ever proposed for that particular average except to clear and grub the stream flowing southward through the edge of sections 23 and 26 but the floodway was never opened. Hence the McDermott lots were left charged with a supposed benefit of $30.00 per acre but entirely abandoned without any drainage improvements whatsoever. To further illustrate, two of the 40 acre tracts belonging to Mrs. Bostwick lay in the south half of Section 27 and were crossed by Sal Taylor Creek, as appears on the Map Exhibit "A" (Vol. I, p. 231). One of those 40 acre tracts was assessed with benefits at $1475.-00, the other at $1575.00. The one last mentioned rated at nearly $40.00 per acre for supposed benefits. These two 40 acre tracts were in the swamp of that creek and the assessments were arbitrary to begin with. Whereas, after the abandonments heretofore shown, those two 40 acre tracts instead of receiving any benefit whatsoever, were actually damaged by excess water being discharged into the upper branches of that creek. Yet, year after year, the supervisors continued to use that original assessment of benefits as a sort of ad valorem basis upon which to levy 15 mills per annum for installment taxes and 3 mills per annum for maintenance taxes. In 48 Am. Jur., Subject "Special or Local Assessments", Section 21, page 580, we find the following well stated proposition:

> "The rule is that a special or local assessment is justified and authorized by, and is unconstitutional and invalid without, a special benefit to the property assessed, resulting from a special or local public improvement.

> The assessment is regarded as compensation for such special benefit."

The text is supported by decisions from this court and practically every state court in the Union.

If such a yard-stick is used in this case there is no possible justification for the taxes levied and sought to be collected out of the awards made by the Federal jury in this case. In the amended answer of petitioners (Vol. II, p. 42) it is specifically charged:

> "That the application which said supervisors undertook to make of said drainage law operated to take the properties of these defendants and their predecessors in title without due process of law and without equal protection of the laws, contrary to the 14th Amendment to the Federal Constitution."

In 25 R. C. L., Subject "Special or Local Assessments", Section 13, p. 98, it is said:

> "The constitutional prohibition against taking private property for public use without compensation is only avoided when there is compensation by an equivalent of benefits. * * * But when the benefit ceases to be an equivalent for the assessment it become pro tanto a taking of private property for public use without just compensation, and therefore unconstitutional."

Without an authorized and confirmed reassessment of benefits the supervisors had no power or jurisdiction to make further levies of installment or maintenance taxes. See *Duncan* case and other cases cited page 55 *supra*. No doctrine of estoppel can supply such want of power or jurisdiction, *Ocean Beach Heights* v. *Brown-Crummer Investment Co.*, 302 U. S. 614, 48 Am. Jur., Subject "Special or Local Assessments" Section 296, p. 782.

Error No. 5. *The courts below severally erred in striking and holding for naught all of those parts of the original*

answer and the amended answer of petitioners which set up the levying of pretended maintenance taxes from 1924 to 1941, inclusive, on lands in abandoned areas where there was nothing to maintain and on other areas where there was no maintenance and during a period when the district was wholly insolvent and wholly unable to furnish any consideration for such levies.

The attack on maintenance taxes is made by Section X of the original answer (Vol. I, p. 134-141). That attack is reaverred and reinforced by Section IV of the amended answer (Vol. II, pp. 39-40). Maintenance taxes began in the year 1924 after the district was insolvent (Vol. II, p. 44), and after a receiver was appointed (Vol. I, p. 145). The receiver reported to the District Court on September 2, 1931, (Vol. I, p. 138) that there had never been any maintenance. The Simons report (Vol. I, p. 139) copy of which is attached to the original answer as Exhibit "G", showed that there had never been any maintenance up to 1928. Instead there was pure abandonment and flooding of areas including petitioners' lands. Nevertheless the supervisors levied from 1924 to 1930, inclusive, 4 mills on the $30.00 per acre assessment against the McDermotts lots or 12¢ per acre per year for pretended maintenance, and from 1931 to 1941, inclusive, they levied 3 mills or 9¢ per acre per year for pretended maintenance taxes. Against Mrs. Bostwick's two 40's in Section 27, appearing on the map (Vol. I, p. 231), they levied from 1924 to 1930, inclusive, approximately 16¢ per acre per year and from 1931 to 1941, inclusive, they levied approximately 12¢ per acre per year for pretended maintenance taxes. To make such levies for pretended maintenance taxes when there was never any original construction in that whole area—nothing to maintain—was nothing short of

"robbery under the color of a better name."

25 R. C. L., page 141, note 7. In the case of *A. C. L.* v. *City of Winter Haven,* 114 Fla. XXV, 151 So. 321, 324, the Supreme Court of Florida announced the same rule,

> "It is also equally well recognized that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax or contribution, and become extortion and confiscation, in which cases it then becomes the duty of the courts to protect the person or corporation assessed from robbery under color of a better name. Allen v. Drew, 44 Vt. 174; Sands v. City of Richmond, 31 Grat. (72 Va.) 571, 31 Am. Rep. 742; Broadway Baptist Church v. McAtee, 8 Bush (Ky) 508, 8 Am. Rep. 480; King v. City of Portland."

Under the facts alleged in petitioners' answers the maintenance taxes under attack were void *ab initio.* The passage of time could not make them valid. It has been repeatedly announced by the Supreme Court of Florida and many other courts that neither laches nor estoppel can be raised against an act such as a tax levy or a special assessment levy which was void *ab initio.* See *Combes* v. *City of Coral Gables,* 124 Fla. 374, 168 So. 524, 3rd headnote; *State Board of Administration* v. *Pasco County,* 22 So. 2d 387, 11th headnote and text supporting the same. Moreover any previous payment of maintenance taxes, such as made by the McDermotts with respect to their lots, could not constitute any basis for estoppel, on the contrary such payment constituted an "unjust enrichment" of the drainage district. *District of Columbia* v. *Thompson,* 281 U. S. 25, 74 L. Ed. 677, —— supra; *Smith* v. *City of Winter Haven,* 18 So. 2d 4. It is also well pointed out in Gray's Limitations of Taxing Power, Section 1999-b, p. 1022, citing and quoting the decision of this court in *O'Brien* v. *Wheelock,* 184 U. S. 450, and other authorities, that where the landowners did not receive the full benefit

of the improvement which was contemplated, there was a partial failure of consideration and that since the consideration was indivisible no part of the special assessment could be enforced. In the *O'Brien* case there was a failure to maintain, after some original construction. Here in abandoned areas there was never anything to be maintained.

Error No. 6. *The Court of Appeals erred in its application of the doctrine of estoppel to the facts alleged in petitioners' answers and admitted by the District's motion to strike.*

In the last reason assigned in the petition, for granting the writ of certiorari, we pointed out that in our view the Court of Appeals misapplied the decisions of this Court in the case of *Shepard* v. *Barron,* 194 U. S. 553, 48 L. Ed. 1115, and in *Utley* v. *City of St. Petersburg,* 292 U. S. 106. We set forth what was involved in those two cases and pointed out reasons why we think they were misapplied. That part of the petition for certiorari is adopted as a part of our brief in support of Error No. 6 above stated.

Relying upon such cases the Court of Appeals apparently overlooked many pertinent matters alleged in the answers of petitioners which were admitted by the attacking motions of the drainage district. For instance the courts below overlooked what was said about the status of the McDermott heirs in the original answer (Vol. I, pp. 86-87), particularly concerning their lack of knowledge as to what had happened in the affairs of the drainage district prior to the institution of this condemnation suit. Again it is specifically alleged in Section III of the amended answer (Vol. II, last half of p. 38 and top of p. 39) that the petitioners:

> "Had no opportunity or means of finding out what the engineers of the district and the supervisors

> thereof had undertaken to do with respect to the changes in the plans of reclamation and the original decree, as more particularly hereinafter shown. On the contrary, the supervisors kept all such matters secret from the property owners and in addition made new cost plus contracts for further drainage improvements, all without any competitive bidding, which said new contracts were predicated upon said changed plans. That the property owners then and at that time of the taking as well as other property owners who became such by mesne conveyances and by tax deeds, had no means of knowing what the supervisors had done in that behalf until the facts, after diligent search were dug up by counsel for these defendants during the period of several months prior to the institution of said Macclenny Turpentine suit in the State Courts."

Again it is alleged in Section VIII (Vol. II, p. 43 to 44) that the position of the drainage district and its bondholders,

> "Has never been changed to the injury by any act or omission to act on the part of this defendants severally. * * * That these defendants and their predecessors in title relied upon said supervisors to obey the law as declared by the General Drainage Statute and as required by the provisions of the 14th Amendment to the Federal Constitution."

In taking that position the petitioners are well supported by the case of *People* v. *LeTempt,* 272 Ill. 586, 112 N. E. 335, 9 A. L. R. 835, holding in effect that even property owners who petitioned for the formation of a drainage district had the right to assume that those placed in authority would obey the law and such property owners were not required to be constantly on watch for violations. The remainder of Section VIII of the amended answer (Vol. II, p. 44) further shows that the drainage district had been utterly insolvent for at least 20 years before this con-

demnation suit was instituted, that it had gone through a 10 year receiver-ship period after which its bonds were being bartered in the public at around 5¢ on the dollar. Moreover the record also shows that the drainage district quit all pretense of making drainage improvements in September 1920, and prior to that time, during 1918, it had adopted revised plans of reclamation providing for the complete abandonment of at least one-fourth (¼th) of the entire area of the district, and made radical changes in the remainder as already explained. After all work was suspended in September 1920, not another "lick" was ever done by way of construction or maintenance. Since the district was itself in default as to original construction and as to maintenance and thereafter became utterly insolvent and unable to perform it was never in position to complain of apparent acquiescence or inaction on the part of property owners.

In 27 R. C. L., Subject "Waiver", Section 5, page 908, 909, the following general rules applicable to acquiescence and waiver are stated:

> "To constitute a waiver within the definitions already given, it is essential that there be an existing right, benefit, or advantage; a knowledge, actual or constructive, of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights, unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them, must plainly appear."

Many decisions of this Court and of other courts are cited in the notes supporting this text. In the same volume, page 910, this further rule is stated:

> "In accordance with the general rule as to the burden of proof, it devolves upon the party claiming a waiver to prove the facts on which he relies for such waiver.

> A presumption of the relinquishment of a known right cannot be rested on a presumption that such right was known."

In the case at bar the drainage district pleaded nothing on the subject of waiver, acquiescence or estoppel. Hence all the more reason why consideration of those subjects by the courts below was error. Again in 19 Am. Jur., Subject "Equity", Section 504, p. 349, it is said:

> "If the complainant had no knowledge of the facts giving rise to the cause of action, he cannot be charged with laches."

Decisions of this Court and of other courts are cited in Note 13 supporting this text.

In 19 Am. Jur., Subject "Estoppel", Section 88, p. 730, the following rule is stated:

> "It is essential to the existence of an equitable estoppel that the representation, whether consisting of words, acts, or omissions, of the party against whom the estoppel is asserted shall have been believed by the party claiming the benefit thereof and that he shall have relied thereon and been influenced and misled thereby."

Many decisions of this Court and other courts are cited in Notes 18, 19 and 20 supporting this text. Among them the case of *Bloomfield* v. *Charter Oak Nat. Bank,* 121 U. S. 121, is cited for the proposition that,

> "No estoppel in pais can be created except by conduct which the person setting up the estoppel has the right to, and does in fact, rely upon."

If this yardstick is applied to the drainage district in this case then it cannot get any comfort from the doctrine of estoppel, especially when it has pleaded none, and proven none.

As a corollary to the same proposition it is further stated in the same volume, Section 846, p. 732, that:

> "Not only the party claiming an estoppel have believed and relied upon the words or conduct of the other party, but also he must have been thereby induced to act, or to refrain from acting, in such a manner and to such an extent as to change his position or status from that which he would otherwise have occupied."

Again many decisions from this court and other courts are cited in the notes supporting this text. Again in the same volume, Section 85, p. 736, it is stated:

> "There can be no estoppel where there is no loss, injury, damage, or prejudice to the party claiming it."

In the case at bar the drainage district has not claimed any loss, injury, damage or prejudice, on the contrary the answers of petitioners show affirmatively that the district suffered no loss, injury, damage or prejudice by anything done or omitted by the petitioners or by those through whom they claim.

As a final authority on this subject we cite the case of *McKeon* v. *Council Bluffs,* 206 Iowa 556, 221 N. W. 351, 62 A. L. R. 1006. In that case the property in question had been separated from the city by a change in the channel of the river through a process of avulsion. The property owner, after a lapse of 50 years, brought an action to have his property excluded from the territory of the city and freed from tax burdens thereof. The city plead laches, acquiescence and estoppel but the court answered all those arguments and gave relief.

Conclusion

As previously noted under Error No. 1, page 9, of this brief, the Court of Appeals erred in first holding itself bound, under the theory of the *Erie Railroad* case, by the

decision of the Supreme Court of Florida in the *Macclenny Turpentine Company* case. The Court of Appeals and the District Court again erred in striking out all those parts of petitioners' answers setting up what is recited in Errors Nos. 2, 3, 4, and 5 respectively. Finally the Court of Appeals erred, in apparently trying to bolster its decision, by erroneously applying certain decisions of this Court on the subject of estoppel. When so doing, the Court of Appeals overlooked the undisputed showing made by the answers of petitioners and overlooked the fact that the drainage district had not plead or proven any acquiescence, waiver or estoppel.

It is now respectfully submitted that petition for writ of certiorari should be granted and that the judgment and decree of the Court below should be reversed.

Respectfully submitted.

THOS. B. ADAMS,
Attorney for Petitioners.

(2978)

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In the Supreme Court of the United States

October Term 1945

NELLIE C. BOSTWICK, et al.,
Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, et al.
Respondents.

No. 838

BRIEF OF RESPONDENTS IN OPPOSITION TO GRANTING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

This is the second time Petitioners have applied for a writ of certiorari in this case. Their former petition was denied, 319 U. S. 742.

A petition was filed by *Macclenny Turpentine Company,* et al. for certiorari to review a decision of the Supreme Court of Florida, to which two Petitioners were parties. That petition was also denied, January 15, 1945. Petitioners now seek review of a decision of the Circuit Court of Ap-

peals, 152 Fed. (2d). 1, which rests upon the decision of the Florida Supreme Court in the *Macclenny Turpentine* case.

This case was instituted by the United States in 1941, to condemn lands lying within the Baldwin Drainage District in Duval County, Florida. No one opposed the right of the Government to take the property, or questioned the sufficiency of the amounts offered. Judgment of Taking was entered June 1, 1942, following verdict of a jury (p. 272 Tr.). All Defendants stipulated that

> "the determination of adverse claims among them might be deferred until after the jury had made its awards of values."

Petitioners and Respondents filed answers to the Declaration of Taking. (Petitioners' answer, p. 81, Vol. I; Respondents' answer, p. 61, Vol. I.). The District asserted liens on Petitioners' lands for taxes levied to pay its debts, and for maintenance. Petitioners attacked the validity of the District, its assessment of benefits, the bonds issued by the District, the taxes levied by the District, etc. They also attacked two decrees of the Federal Court entered in 1931, of foreclosure of delinquent taxes. Respondents moved to strike that answer, and Petitioners countered with a motion to defer action until the case of *Macclenny Turpentine Company* vs. *Baldwin Drainage District,* 18 So. (2d) 792, then pending in the State Court, which involved the same questions of law, should be determined (p. 265, Vol. I). The District Court deferred decision upon the validity of taxes that had not been foreclosed (pp. 274-5), and (p. 276) refused to vacate the foreclosure decrees. Petitioners appealed from that order. The Court of Appeals, (133 Fed. (2d) 1,) affirmed. Application to this Court for certiorari was denied, 319 U. S. 742.

Meantime, the *Macclenny* case reached the Florida Su-

preme Court, which, April 4, 1944, rendered an opinion, 18 So. (2d) 792, and ordered the bill of complaint dismissed. Application to this Court for certiorari was denied January 15, 1945.

Four days after this Court denied certiorari, Petitioners (without leave of court) filed an amended answer (pp. 33-45, Vol. II, Tr.) which (pp. 3-4 Petition) they say was for

> "the specific purpose of meeting the federal question deficiencies claimed to have existed in the state court record".

The District Court (p. 45, Vol. II) held that the answer and amendment were insufficient in law, and (p. 47, Vol. II, Tr.) ordered distribution.

Seven of the grounds for the writ (pp. 6-18 of the Petition) were not raised in the District Court or argued in the Court of Appeals. (See Petitioners' "Statement of Points", p. 53, and "Additional Point", p. 57). They were first raised in a petition for rehearing (p. 71 Tr.).

This Court has repeatedly held that it will not, in an appeal from a State Supreme Court, consider a Federal question which is raised for the first time in a petition for rehearing; *Loeber* vs. *Schroder,* 149 U. S. 580; *Johnson* vs. *New York Life,* 187 U. S. 491; *McCorquodale* vs. *Texas,* 211 U. S. 432; *Citizens National Bank* vs. *Durr,* 257 U. S. 99; especially where, the petition was denied without opinion.

All of the reasons given for that rule apply with equal force here, though this petition seeks review of a decision of a Circuit Court of Appeals.

The opinion of the Court of Appeals rests largely upon the decision of the Florida Court in the *Macclenny* case,

supra, and upon *State* vs. *Covington*, 148 Fla. 42, 3 So. (2d) 521. As the Supreme Court of Florida said, the objections of Petitioners in the *Macclenny* case

> "ran the full gamut of the District's existence from its very inception".

Its decision was that the bill of complaint should be dismissed because it failed to show that the former owners of the lands had objected to the acts challenged

> "or that any of their successors protested until the filing of the present bill";

that Petitioners were estopped

> "because of the extensive period of time which elapsed between the formation of the District and the filing of the bill" (a period of about 25 years).

The Court of Appeals in this case said that the Florida Court had

> "adjudged that the property owners of the District were estopped to challenge the propriety of the formation or acts of the District by the acquiescence of themselves and their predecessors in title over a period of more than 27 years";

that Petitioners were in no better position than were Plaintiffs in the State Court case.

With reference to the claim of Petitioners that their rights under the Fourteenth Amendment had been violated, it said

> "the acquiescence which estopped them to enforce their particular rights likewise operates as a waiver of the general right to enforce due process".

REASONS WHY WRIT OF CERTIORARI SHOULD NOT ISSUE

There are three reasons why this Court should not issue a writ of certiorari to the Fifth Circuit Court of Appeals:

1. In their pleading in the District Court, Petitioners alleged that the case of *Macclenny Turpentine Company* vs. *Baldwin Drainage District* in the State Court would determine

> "the numerous state statutory questions presented in this case",

They should not now be allowed to say that those questions were not determined, since the Florida Supreme Court dismissed that complaint.

2. Whether Petitioners are, by acquiescence or estoppel, barred from attacking the validity of the lien of District taxes, is a question of State law, not a Federal question. The Supreme Court of Florida in the *Macclenny* case held that land owners had acquiesced, waived, or were estopped.

3. The validity of the liens of the District for taxes is a matter of State law that has been determined by the Supreme Court of Florida. Being prior liens, they are payable from the funds deposited by the Government, before distribution of any funds to landowners.

1. *Inconsistent position of Petitioners in their pleadings.*

After it appeared from the answers of Petitioners and Respondents (pp. 81 and 61, Vol. I) that they did not contest the right of the Government to take the lands, or the amounts offered therefor, Respondents moved to strike Petitioners' answer (p. 257, Vol. I). Petitioners countered with a motion (pp. 265-70, Vol. I) to defer and postpone a decision of the

> "questions of conflicting title presented by the answer of petitioners"

until after the State Courts should decide *Macclenny Turpentine Company* vs. *Baldwin Drainage District,* et al. supra, because, as they said, the questions involved in this case were

> "pending for decision in the State Courts";

that two of Petitioners were

> "parties plaintiff to said suit of *Macclenny Turpentine Co.* et al vs. *Baldwin Drainage District*"

and expected to join with others in an appeal to the Supreme Court of Florida if the lower court should decide against them

> "so as to have the numerous *state statutory questions* presented duly and promptly determined."

Their motion also sought to defer action upon the validity of the foreclosure decrees. The District Court's order (pp. 274-5) recited pendency of the suit in the State Court to enjoin the levy and collection of taxes by the District

> "on the ground that the same are illegal and void, and that the legal questions raised in that suit are similar, and in many respects identical to the questions raised by the said answer, and that said questions involve a decision of the applicable Florida law which has not heretofore been settled by the Supreme Court of Florida",

and postponed a decision of those questions until further order of the Court (pp. 276-82).

It also overruled Petitioners' contention that the foreclosure decrees were void. From that order the previous appeal in this case was taken; judgment was affirmed and certiorari denied (supra).

On April 4, 1944, the Supreme Court of Florida decided the *Macclenny* case. This Court denied the petition for certiorari on January 15, 1945. Four days after certiorari was denied, Petitioners filed an amended answer in this case (p. 33, Vol. II), and began relitigation of these State statutory questions. Yet this Petition and supporting brief directly (p. 13) and indirectly say that the decision of the Florida Court did not settle or determine

"the state statutory questions"

which they previously said would be settled thereby. They assume that the Florida Court's decision is limited, and ignore the fact that the Court directed the lower court

"to enter an order dismissing the bill".

That bill has been dismissed. The bill was held to have *no equity*. Since two Petitioners were parties to the suit in the State Court, and all parties were represented by counsel for these Petitioners, it is apparent that the purpose of this proceeding is to relitigate here questions that were settled by the State Court's decision.

2. *Acquiescence and laches is a question of State law and does not involve a Federal question.*

The Circuit Court of Appeals so held in its opinion. That was the only point raised by Petitioners in their appeal, as the pleadings and the Specification of Points show. The Circuit Court of Appeals said the claim of Petitioners, that enforcement of the taxes would deprive them of property without due process of law, was involved in the *Macclenny* case, and

"was foreclosed against them by that decision".

The effort of Petitioners to show the contrary must fail because

(1) the opinion and order of the Florida Supreme Court was that the bill of complaint should be dismissed. This was a ruling on all matters presented by the bill;

(2) Petitioners in the District Court alleged that the case in the State Court was similar, and the order of the District Judge found it was

"in many respects identical";

(3) The bill of complaint in the *Macclenny* case (p. 1 of Case 714 of the October Term of 1944 of this Court) and the answers of Petitioners in this case (Vol. I, p. 81 et seq. and Vol. II, p. 33 et seq.) show that the cases are identical in the relief sought and the purposes to be accomplished, as well as in the allegations of substantial facts. Both cases were prosecuted by the same counsel, at the same time, and two of these Petitioners were parties to the *Macclenny* case.

Petitioners say that the District Court and the Circuit Court of Appeals in effect held, that under the *Erie* case they were bound by the decision of the Supreme Court of Florida in the *Macclenny* case, but no such statement appears in the order or opinion of those courts.

The *Erie* case does hold that Federal Courts must accept a decision of the Florida Supreme Court as controlling on questions of State law. But even prior to that decision, Federal Courts followed decisions of State Courts construing and applying State statutes, particularly where, as here, the decision of the State Court involved the same District, and the same substantial questions of fact and law.

This Court holds that

> "a person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute,

and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one."

Eustis vs. *Bowles*, 150 U. S. 361; *Rutland Ry. Co.* vs. *Central Vermont Ry. Co.*, 159 U. S. 630; *Seneca Nation* vs. *Christie*, 162 U. S. 283, and *Pierce* vs. *Somerset Ry. Co.*, 171 U. S. 641. (The above quotation is from this case).

It applied this to a case involving the validity of Irrigation or Drainage District taxes, *Enterprise Irr. District* vs. *Farmers Mutual Canal Co.*, 243 U. S. 157, and to a case where the validity of a paving lien was attacked, *Utley* vs. *St. Petersburg*, 292 U. S. 106 (a Florida case).

In *Shepard* vs. *Barron*, 194 U. S. 553, and in *Tulare Irr. Dist.* vs. *Shepard*, 195 U. S. 1, taxpayers were held to have lost their rights by acquiescence or estoppel. The Florida Supreme Court cited the latter case as authority for its decision.

3. *The validity of the lien of the District for taxes levied by it is a question of State law.*

The validity of the statute of Florida under which the District was organized is not attacked in this proceeding. The attack is upon taxes levied for the payment of the District debts and for maintenance of the District, on facts *de hors* the record.

State vs. *Covington*, 3 So. (2d) 521, was a direct attack upon the validity of the organization of the District, and was dismissed by the Florida Court. That decision was reaffirmed in the *Macclenny* opinion. Relators in the *Covington* case included Petitioners. In that case, the Florida Court dismissed the proceeding because the District possessed

> "jurisdiction and powers pursuant to which contractual and other rights have been acquired and not fully discharged",

that is, it had not paid its debts. The District was preserved to protect those contractual rights. Petitioners would ignore the rights of creditors, as their brief shows. As the Florida Court said, it is too late for Plaintiffs

> "to repudiate the obligations of the District".

Thus the Florida Supreme Court has held that the District had power to levy taxes to pay its debts; that taxes it has levied are not void for any of the reasons set forth in the Complaint in the *Macclenny* case. This Court refused to review that decision of the Florida Court. The Court of Appeals affirmed the decision of the District Court, holding that the answers of Petitioners are insufficient.

The validity of taxes levied by a State, or a subdivision of a State, upon property taken by the Federal Government in a condemnation proceeding, is a question of State law only. This has been repeatedly decided by Federal Courts. *U. S.* vs. *Certain Parcels of Land,* 130 Fed. (2d) 782; *Hobo* vs. *U. S.,* 94 Fed. (2d) 351; *U. S.* vs. *Certain Parcels of Land in San Diego,* 44 Fed Sup. 936; *U. S.* vs. *Certain Parcels of Land in Prince Georges County,* 40 Fed. Sup. 436; *U. S.* vs. *Hotel Buckminster,* 59 Fed. Sup. 65, and *U. S.* vs. *5 Acres of Land,* 51 Fed. Sup. 117.

The reason is obvious. The amount the Government has to pay for the land is not affected by their existence or the amount of them. The verdict and Judgment of Taking finally disposed of the Government's interest in the suit, and to all practical intents and purposes, the United States was thereafter not a party. Litigation since then has involved merely a private controversy between Petitioners

and Respondents as to the validity of the liens for taxes that were levied before the lands were taken. Since the Florida Court has held those taxes valid, the lien is now against the funds deposited by the Government. That is not controlled by the Federal statute.

The provisions of Sec. 258(a) that

> "The Court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, * * * if any, as shall be just and equitable"

did not, since it could not, authorize a Federal Court to refuse to pay valid tax liens, or to arbitrarily determine that a lesser amount be accepted by the lien holder in satisfaction of its liens. The tax had to be paid in full in order to clear the title. Besides, Petitioners in this case have not questioned the amount of taxes due. They have contended that the taxes *were wholly void,* and that contention has been decided against them by the State Court.

Validity of the State statute under which the District was organized is not questioned. Validity of the District under the statute has been determined by the State Court and is now admitted by Petitioners. Validity of taxes has also been determined by the Supreme Court of Florida. The liens of the District are, therefore, against the funds in the hands of the Court, and those liens must be paid before a distribution of them can be made to any other parties. Payment of the liens is "just and equitable", for equity follows the law. Unless the liens are paid, there will be neither justice nor equity.

U. S. vs. *Certain Lands,* 129 Fed. (2d) 577 is not to the contrary. Neither the validity of the mortgage lien in that case, nor the amount due thereon was questioned. The Court's reference to the statute was not necessary to de-

cision. The only question decided was the date to which interest on the mortgage should be paid. The New York statute applied to condemnation by the State only, and had no application. Petitioners here do not question either the amount of the lien or the amount of interest due the District.

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be denied for the reasons given.

Respectfully submitted,

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JOHN W. HARRELL,
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Attorneys for Respondents.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 838

NELLIE C. BOSTWICK, ET AL.,
Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, ET AL.,
Respondents

REPLY BRIEF FOR PETITIONERS

The short brief for Respondents contains much error of fact and of law.

Error as to Parties and the Purpose of Such Error

At pages 1, 6, 7 and 8 of Respondent's brief it is asserted that "Two of the petitioners" were parties plaintiff in the *Macclenny Turpentine Company* case. That is untrue. At other places, such as page 4 of Respondent's brief, it is asserted that "petitioners" (meaning petitioners now before this Court) in the *Macclenny Turpentine Company* case did this and that. Again untrue. The record in the *Macclenny Turpentine Company* case brought to this Court when certiorari was denied January 15, 1945, 89 L. Ed. (Adv. 415), shows, page 1, that there were *Eleven* plaintiffs in that case and that Mrs. Bostwick

derived the small acreage of property which she claimed in that case from entirely different sources—part of it through a State Tax Deed issued in 1937. All this counsel for Respondents well knew because he was counsel for Defendants in that case and has a copy of the printed record filed in this Court.

In this particular case (C. C. A. #11347) there are Eight petitioners, Mrs. Bostwick, Jacksonville Heights Improvement Company, and six heirs of P. F. McDermott. See page 1 of the Petition. The Notice of Appeal to the Fifth Circuit Court of Appeals and the Statement of Points, Vol. II, pp. 51, 53 show that the appellants in those four cases listed Vol. II, pp. 51, 53, were taken by *Twenty* parties. The Stay Order, Vol. II, pp. 82, 83, in effect made all those appellants Petitioners here, but *Mrs. Bostwick is the only one of them who was a party to the Macclenny Turpentine Company case.* This fact was well known to opposing counsel. Then why his repeated assertions to the contrary? The answer is obvious. In the first several pages of his brief he is trying to put over the argument that by Petitioners' Answers filed in the District Court and by their petition for writ of certiorari, they are now trying to "re-litigate" questions that were settled by the State Court between the *same* parties. In the case of *National Licorice Co.* v. *N. L. R. Board,* 309 U. S. 350, 362, 84 L. Ed. 799, 809, this Court restated the following rule:

> "It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights in personam of parties not brought before it by due process of law."

These Twenty petitioners have not had their day in Court because the Orders of the District Court (affirmed by the Circuit Court of Appeals) striking their Answers

denied their right to be heard according to the "Law of the Land" as defined by Mr. Webster and approved by this Court. *Hovey* v. *Elliott,* 167 U. S. 407, 42 L. Ed. 215.

Assertions That the Facts of This Case Are the Same as in the State Case Are Error

At page 8 of Respondent's brief it is urged as a companion argument that the state case involved "the same substantial facts." This argument ignores the essentially different facts as to P. F. McDermott and his heirs pointed out at pages 28, 29 and 68 of our first brief. That argument ignores the essentially different facts regarding complete abandonment and damage by flooding to Mrs. Bostwick's parcel #23 and the parcels owned by Jacksonville Heights Improvement Company pointed out at pages 39 to 43 of our first brief. The argument also ignores the facts pleaded here and pointed out pages 47 to 55 of our first brief involving a complete new plan of drainage for nearly all of the "Gunnery Range" area involved in C. C. A. cases #11354 and #11355 (D. C. Cases 481 and 527). Our first brief pointed out that in undertaking to authorize and contract for such new plan of drainage the district, through its supervisors and engineers, completely ignored what is now Section 298.27, Florida Statutes 1941. No such facts were presented in the *Macclenny Turpentine Company* case. Many other dissimilar facts could be pointed out. Moreover in the late case of *City of Stuart* v. *Green,* 23 So. 2d 831, 833, decided November 16, 1945, the Supreme Court of Florida again said,

> "We have said repeatedly that laches must be tested by the facts of the particular case, that it does not depend merely upon the lapse of time."

Therefore, if Federal Courts in the administration of 40 U. S. C. A., Section 258a, are bound by State Court de-

cisions in all respects, the foregoing rule reiterated since the Macclenny Turpentine Company decisions means that the District Court and the Circuit Court of Appeals were both wrong in not considering and deciding the case presented by petitioners on its merits.

Petition Determines Scope of Review

At page 3 of the brief for respondents, counsel makes the erroneous argument that the Federal Questions presented by the petition for writ of certiorari were raised for the first time in a petition for rehearing and may not now be considered by this Court because that petition was simply denied. All the cases cited in support of that argument were cases decided by state appellate courts and not cases decided by Courts of Appeal. Many decisions of this Court have held that under Rule 38 of this Court the Court's consideration of a case will be "limited to the questions specifically brought forward by the Petition for Writ of Certiorari". *General Talking Pictures Corp.* v. *Western Elec. Co.,* 304 U. S. 175, 82 L. Ed. 1273. In that case the Court explained that the specifications of error in a supporting brief do not expand but merely serve to identify and challenge rulings upon which is grounded ultimate decision of the matters involved. The ruling of the case just cited was reaffirmed in the case of *National Licorice Co.* v. *National Lab. Rel. Board,* 309 U. S. 350, 357, 84 L. Ed. 799, 807, footnote 2. In the case at bar seven questions were presented by the Petition, pages 6 to 12 inclusive. The supporting brief set forth six Assignments of Error, pages 33 and 34. We think that the questions presented by the Petition and Assignments of Error come within the rule set forth in the *General Talking Picture Corporation* case. The petitioners did not have the gift of prophecy so as to make it necessary for their counsel to warn the Court of Appeals

against an erroneous application of the doctrine of *Erie R. Co.* v. *Tompkins* in these non-diversity of citizenship cases. Furthermore it was expressly held by this Court in *Friend* v. *Talcott,* 228 U. S. 27, 57 L. Ed. 718, as stated in the first head note (L. Ed.) reading as follows:

> "Questions passed upon by the circuit court of appeals are open for consideration in the Federal Supreme Court on writ of certiorari, though not raised in, nor considered by, the trial court."

Under this rule the Petitioners are undoubtedly entitled to a consideration of the several questions presented by the petition having to do with a misapplication of the doctrine announced in the *Erie R. Company* case. In like manner the Petitioners had no way of anticipating what other errors might be committed by the Court of Appeals. Hence under Rule 38 it is the particular function of the petition for writ of certiorari to point out wherein the decision of the Circuit Court of Appeals was erroneous. That is what the petition in the instant case undertakes to do. It is true substantially the same questions were presented by the Petition for Rehearing to the end that the Court of Appeals might itself correct its own errors, but that effort on the part of the Petitioners did not detract from their right to have those errors considered when the same questions are properly presented by their petition for the writ.

If it were necessary to go further back in the record it will be found in the motion for trial on adverse claims, Vol. II, pp. 6 to 12, particularly in paragraphs 4, 5, and 9, that the Petitioners there asserted, in the District Court, some of the same questions which are brought forward in the Petition. That motion was filed in October, 1944. Still later and four days after certiorari was denied as to the *State* case, the Petitioners filed an amended answer on January 19, 1945, Vol. II, pp. 33 to 45, and again specifically

invoked the protection of the 14th Amendment. The same is true of the Statement of Points relied upon in the Court of Appeals, Vol. II, pages 53 to 56.

Argument on Nonapplicability of Erie R. Co. v. Tompkins Remains Unanswered by Respondents' Brief

At bottom of page 3 and top of page 4 of Respondents' Brief it is said,

> "The opinion of the Court of Appeals rests largely upon the decision of the Florida Court in the Macclenny case, supra, and upon State v. Covington."

State v. *Covington,* as explained in our first supporting brief, page 26, was a *quo warranto* case where the Supreme Court of Florida simply held that the district had, "at least a defacto existence". Our first brief made it plain that the petitioners here made no further contest on that question. Therefore the quotation last above, from page 3 of the Respondents' Brief, amounts to a concession that the Court of Appeals, and for that matter the District Court, held themselves bound by the doctrine of the *Erie R. Company* case. Indeed, the Court of Appeals, as quoted on page 5 of our Petition, expressly stated that the course of that Court had been charted by the Supreme Court of Florida "and we must follow it". After making the concessions aforesaid counsel for Respondents makes no response whatsoever to questions I, II and III of the Petition, pages 6 and 7, and they make no response whatsoever to the "A" and "B" reasons relied on, pages 18 and 19 of the Petition, and they make no response whatsoever to our argument under the first Assignment of Error, pages 35 to 38, of our supporting brief. Those several parts of the Petition and first supporting brief are resubmitted as being wholly unanswered by the Respondents.

There Is No Such Inconsistency in the Pleadings of Petitioners as Would Justify Denial of Writ of Certiorari

At page 6 of brief for Respondents, counsel asserts there are three reasons why writ of certiorari should not be issued. As a first reason they contend that the petitioners by their pleadings, appearing in the record, have taken inconsistent positions. That argument is unsound. It is true that on June 1st, 1942, certain parties to this suit, including some of the petitioners here, moved the Court to defer action on the adverse claims, then presented by answers on file, until the State case of *Macclenny Turpentine Company, et al.,* then pending, was determined. It is also true that these petitioners and their undersigned counsel then expected that the State court would decide, *on their merits,* the attacks on drainage taxes which were being levied by the Baldwin Drainage District against certain lands (not involved here) lying on the Western side of the district; also that the State court would, in deciding the merits of such attacks, construe the statutory provisions involved. But in this they were disappointed and as pointed out at page 13 of the petition filed here the Supreme Court of Florida by-passed the real defenses or real bases of attack made by the Bill of Complaint and undertook to dispose of the case on the basis of supposed,

> "Acquiescence on the part of those (former owners of the lands involved) who could have protested."

We have heretofore pointed out that the majority opinion of the Supreme Court of Florida did not construe or apply what are now Sections 298.07 and 298.27, Florida Statutes 1941, or any other Section of the Florida Drainage Law relied upon to sustain the attacks made in the State court. Neither did the majority opinion of the Supreme Court of Florida recognize or decide any point urged under the 14th

Amendment. Therefore it is perfectly clear that when the petitioners on January 19, 1945, filed their amendments to their answers, Vol. II, pp. 33 to 45, specifically invoking the protection of the 14th Amendment, they were not attempting to re-litigate what had already been decided by the Supreme Court of Florida. On the contrary they were attempting to have the District Court decide the Federal questions, properly invoked by said amendments, that had been left undecided by the Florida Supreme Court.

On the subject of inconsistency we may appropriately quote from the brief of Messrs. Patterson & Harrell filed for the Respondents when petition was filed here in case #714 for writ of certiorari in the *Macclenny Turpentine Company* case. The same counsel, who now argue that the Supreme Court of Florida decided everything, asserted at pages 3 and 4 of said brief,

> "No Federal question is presented for decision."
>
> • • • • • • •
>
> "There is no specific reference to any particular section of the Federal Constitution and in every instance the charge is a violation of ' "State and Federal Constitutions." ' "

At page 8 of the same brief the same counsel further say,

> "This record not only shows that no Federal question was set up or claimed in a proper manner and time, but that *no such question was decided by the State Supreme Court either expressly or by necessary intendment.*" (Italics ours.)

That line of argument made in the former case and of which this Court may take judicial notice is directly contrary to the argument made on pages 6 and 7 of the brief for Respondents filed in the case at bar. By denial of writ of certiorari in the *Macclenny Turpentine Company* case this

Court presumably agreed with the argument above quoted from the brief of counsel in said former case. Having made such an argument and having gotten a favorable decision thereon it appears to us that the able counsel, who made the argument, are now estopped to shift their position when the shoe is on the other foot.

Acquiescence and Laches Are No Answer to the Federal Questions Presented in These Cases

Reason "E" for granting the Writ, stated at page 21 of the Petition, is that the Court of Appeals misapplied the decisions of this Court in *Shepard* v. *Barron,* and *Utley* v. *St. Petersburg* and like cases. On pages 21 and 22 of the Petition we distinguished those cases from the facts in the case at bar and admitted by the attacking motions of the Respondents.

Under Error No. 6, discussed pages 68 to 72 of our supporting brief, we further discussed the error of the Court of Appeals in the misapplication of the doctrine of estoppel and cited many decisions of this Court and other authorities to sustain our position. Opposing counsel makes no attempt to answer our argument on the merits. He makes no contention that *Shepard* v. *Barron,* and *Utley* v. *St. Petersburg* were not sufficiently distinguished. He makes no effort to show the inapplicability of other authorities, cited page 22 of our Petition, and still others cited and quoted pages 70 to 72 of our supporting brief. Ordinarily acquiescence and estoppel are questions of state law and do not involve a Federal question, provided the question of estoppel or acquiescence has fair support and is not so unsound as to be essentially arbitrary or merely a device to prevent a review of the other grounds of the judgment, including Federal questions raised by the same record. These limitations were fully recognized and stated in

Enterprise Irrigation District v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164, 165; 61 L. Ed. 644, 649.

Additional cases, cited the first half page 9 of respondents' brief, are just as inapplicable to the admitted facts of this record as are *Shepard* v. *Barron* and *Utley* v. *St. Petersburg*. This fact is illustrated by *Pierce* v. *Somerset Ry. Co.* In that case the complaining parties had for a long period of time acquiesced without any objection to the operations of *Somerset Ry. Co.*, during which time the railway line was extended, net earnings were distributed in the form of dividends and otherwise. The conditions and the relationships of the parties interested in the railway had materially changed. Complaining parties claimed to be trustees for certain interests in the property so operated by the railway. The doctrine of estoppel was applied to the peculiar facts of that record. The case at bar presents no such facts. In *Eustis* v. *Bowles*, discussed in *Pierce* v. *Somerset Ry. Co.*, the complaining party had accepted dividends under the insolvency proceedings involved. Hence he was held to have waived his right to claim that the discharge, obtained under subsequent laws, violated the obligations of his contract. According to the old adage he could not have his cake and eat it, too. No such case is presented by the record at bar. In the *Enterprise Irrigation District* case the adversaries of the canal company likewise by their own conduct precluded themselves from questioning the canal company's claims. No such case is presented by the record at bar.

It is true that the Supreme Court of Florida cited *Tulare Irrigation District* v. *Shepard*, 195 U. S. 1, but that case is just as far from having any pertinency here as the case of *Shepard* v. *Barron* distinguished in our petition pages 21 and 22. The *Tulare* case was a suit against the irrigation district by certain bondholders to obtain a judgment on

matured coupons. It was not a case to enforce irrigation taxes. Two property owners intervened and undertook to make common cause with the irrigation district in trying to repudiate the bonds on technical grounds, after the bonds had been purchased and held by bona fide owners for "full value." In the meantime the intervening property owners had received "full benefit" of the irrigation project with respect to their own property and had otherwise acquiesced and approved the project including the sale of negotiable bonds to the plaintiffs for "full value". We have no such case here; on the contrary *the lands of petitioners received no benefits whatsoever* in the lower part of the Cecil Field area and in addition the excess water discharged into the upper streams flowing through that area flooded the lands annually more than they would have been had there been no drainage improvement anywhere in the district. In short, there was a *complete failure of consideration* for all the taxes sought to be imposed against the properties of petitioners. *District of Columbia* v. *Thompson,* 281 U. S. 25, and other cases cited pages 44 and 45 of our supporting brief.

The Validity or Invalidity of a Lien for Drainage Taxes May Be Either a Question of State Law or a Question of Federal Law Depending upon the Case Made by the Pleadings.

At page 9 of brief for Respondents, counsel takes the erroneous position that the question of the validity of the drainage taxes is *solely a question of State law.* Such an error is obvious, otherwise there could be no situation to which the 14th Amendment could apply. In *Stewart* v. *Daytona, etc., Inlet Dist.,* 94 Fla. 859, 114 So. 545, a district tax was held void because the statute under which the same was levied carried no proper limitation as required by Sec-

tion 3, Article IX of the State Constitution—a case of State law. In the case of *Dixon* v. *City of Cocoa,* 106 Fla. 855, 143 So. 748, a tax was held void because the assessment carried an insufficient description—a question of State law.

On the other hand this Court held in *Myles Salt Co.* v. *Board of Commissioners,* 239 U. S. 478, 60 L. Ed. 392, as stated in the first headnote (L. Ed.) reading:

> "The contention that a State law as administered and justified by the highest court of the state violates the Federal Constitution presents a Federal question which will support a writ of error from the Federal Supreme Court to the state court, although the state law as written is not attacked."

To like effect *Gast Realty & I. Co.* v. *Schneider Granite Co.,* 240 U. S. 55, 60 L. Ed. 523, and *Road Improvement Dist. No. 1* v. *Mo. P. R. Co.* 274 U. S. 188, 71, L. Ed. 992, first and second headnotes.

In the case of *Duncan* v. *St. John's Levee & Drainage Dist.,* 69 F. 2d, 342 8 CCA, the opinion supporting the 3rd headnote, among other things, said:

> "It was the view of the trial court that property cannot be taxed for benefits when none exist. Any attempt by taxing authorities to impose a burden without a compensating advantage is power arbitrarily exerted, 'amounts to confiscation and violates the due process provision of the Fourteenth Amendment'. *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478, 36 S. Ct. 204, 60 L. Ed. 392."

The cases cited on page 10 of Respondents' brief do not support the proposition stated middle of that page. In the case of *U. S.* v. *Certain Lands,* 130 F. 2d, 782, the question involved was whether there could be any pro rate of general taxes for the year during which the property was taken over for public use. There was no attack whatsoever

on the validity of the taxes involved. The Court held there could be no pro rate because under the State statute the lien for the taxes attached as of January 1st, of the year in which the property was taken. Therefore, the general taxes levied for that year had to be paid in full out of the award. Again in *Hobo* v. *U. S.* 94 F. 2d, 351, there was no attack on the validity of the general taxes in question. The sole matter determined was whether the successor tax collector was entitled to demand payment from the fund in Court. The Court answered in the affirmative because as an official the new collector simply stepped into the shoes of his predecessor. The citation of such cases simply ignored all of the attacks upon both installment taxes and maintenance taxes made by the amended answers of Petitioners and those parts of their original answers adopted and brought forward by the amended answers. Those attacks upon the validity of the taxes embraced attacks upon statutory grounds and upon the 14th Amendment. It is familiar law that when the Court has jurisdiction to determine Federal questions based upon the 14th Amendment it also has jurisdiction to determine questions based upon the State statutory law.

On page 10 of Respondents' brief they make the repeated assertion that the Florida court held the taxes valid, referring, it is assumed, to the holding in the *Macclenny Turpentine Company* case. As a matter of fact the Florida Supreme Court did not hold valid the taxes, involved in that case as to other lands owned by other parties, but simply held that the parties in that case *could not be heard* on the questions of validity or invalidity presented by their bill because of,

"Acquiescence on the part of those who could have protested." In this new case not dependent on diversity of citizenship, the Federal district court and the Court of

Appeals had an independent responsibility to decide all questions involved in these cases on their merits irrespective of the conclusion as to acquiescence reached and stated by the majority of the State court in the *Macclenny Turpentine Company* case.

The Merits of Major Questions Presented in Our Petition and Amplified by Our Supporting Brief Have Been Left Unanswered by Respondents' Brief.

As we have seen thus far the whole effort of counsel for Respondents is to build up a barrier of acquiescence or estoppel to *preclude* a consideration of any question presented by our Petition and supporting brief on the *merits* thereof.

As to questions I, II, and III of the Petition pages 6 and 7 thereof and as to Error No. 1, pages 35 to 39 of our supporting brief, the brief for respondents says nothing, except to assert that the case of *U. S.* v. *Certain Lands,* 129 Fed. 2d, 577, is not in point. The fact remains however that the Second Circuit Court of Appeals in that case specifically held as stated in the second headnote, quoted at page 20 of our Petition. It was there distinctly held that the law of New York with regard to allowance of interest in condemnation suits did not apply and that the Federal Court administering 40 U. S. C. A., Section 258a, would apply a Federal Rule for the reason that the application of that Federal Statute *involved a question of Federal law and not State law.* No attempt whatever is made by counsel for respondents to answer any of the other cases cited by us in connection with questions I, II, and III of the Petition or cited by us in connection with Error No. 1 discussed in the supporting brief beginning page 35.

Again the brief for Respondents is entirely silent with respect to question number IV stated in our Petition at

page 8, and Error No. 2 discussed in our supporting brief beginning page 39. The same is true with respect to question number V stated in our Petition at page 9, and our discussion of Error No. 3 beginning page 47 of our supporting brief. Likewise Respondents' brief is entirely silent with respect to questions VI and VII of our Petition pages 11 and 12, and of Errors No. 4 and 5 discussed pages 58 to 68 of our supporting brief. The complete silence of the brief for Respondents with regard to these questions amounts to an admission of their soundness and amounts to an admission by opposing counsel of his inability to answer the same on their merits.

Before closing this discussion we wish to bring to the Court's attention another recent decision of the Supreme Court of Florida which, we believe, squarely sustains our contention of a *failure of consideration for both installment taxes and maintenance taxes,* because of complete abandonment, no original construction and no maintenance coupled with long insolvency and inability to perform, as pointed out pages 44 to 47 and pages 65 to 68 of our supporting brief. In the case of *City of Stuart* v. *Green,* 23 So. 2d, 831, rehearing denied December 17, 1945, more than a year since the *Macclenny Turpentine Company* case, the Court, in substance, held that after a lapse of 18 years and the passage of a resolution undertaking to approve an indebtedness represented by certain promissory notes and after the passage of an act of the legislature intended to validate said indebtedness and authorize issuance of bond therefor, the city was not precluded by laches or acquiescence from attacking the validity of the notes and procuring their cancellation for failure of consideration. The matter of failure of consideration resulted from the fact that the deed whereby certain properties were attempted to be conveyed for the notes was void because of bad description and because the

contract for the deed to the property was void in that one of the city commissioners was a controlling stockholder of the vendor owner of the property. In support of the 4th and 5th headnotes the Court pointed out that laches must be tested by the facts of each particular case and then said,

> "Eighteen years have passed since the transaction under examination was consummated. Even so, it is the same notes then given upon which suit now pends, and any defense to them is still available. Beekner, et vir. v. L. P. Kaufman, Inc., et al., 145 Fla. 152; 198 So. 794."

The case of *Beekner* v. *Kaufman, Inc.,* cited as authority, specifically held, third headnote,

> "A defense should be as long-lived as cause of action."

That is exactly our contention in this case as expressed middle of page 44 of our supporting brief. Hence as held in *District of Columbia* v. *Thompson, supra,* the *defense of failure of consideration against the collection of special assessments is as long-lived as the claim for such assessments.* That is simple justice. The Supreme Court of Florida in the late *Stuart* case sustained that proposition. In fairness to that Court it must be said that when we presented the *Macclenny Turpentine Company* case we had not, up to that time, found the decision of this Court in *District of Columbia* v. *Thompson* and the line of cases cited and approved thereby. We now feel confident that if another drainage tax case, such as the one at bar, should come before the Supreme Court of Florida that court would, under the facts pleaded in the case at bar, recognize and enforce the defense of failure of consideration as applied to both installment taxes and maintenance taxes.

We now again respectfully submit that each and every of the questions presented by our petition is meritorious and that the said petition presents sound and sufficient reasons why Writ of Certiorari should issue in this case.

Respectfully submitted,

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